# Petition

81-949

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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BLACKIE'S HOUSE OF BEEF, INC.,
*Petitioner*

v.

LEONEL J. CASTILLO, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, et al.,
*Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service has the authority to obtain and execute a civil search warrant?

2. Whether searches by the Immigration and Naturalization Service for aliens pursuant to a warrant require probable cause?

3. Whether an alien must be particularly described on the search warrant if he is the object of the search?

4. Whether the case should have been remanded for a thorough consideration of the sufficiency of the search warrant under the new guidelines announced by the Court of Appeals?

## PARTIES

The petitioner is Blackie's House of Beef, Inc. It has no parent companies, affiliates or subsidiaries.

The respondents are Leonel J. Castillo, Commissioner of the Immigration and Naturalization Service; E. J. Wildblood, Acting Regional Commissioner; Joseph A. Mongiello, District Director; and Russell G. Parry, Jr. of the Immigration and Naturalization Service.

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BLACKIE'S HOUSE OF BEEF, INC.

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LEONEL J. CASTILLO, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, et al.,

*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Blackie's House of Beef, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which reversed the judgment of the District Court in *Blackie's House of Beef, Inc. v. Castillo,* 480 F. Supp. 1078 (D.D.C. 1979) (Blackie's II).

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) yet to be reported, was filed on July 22, 1981.

The opinion of the District Court (Appendix D) is reported at 480 F. Supp. 1078.

## JURISDICTION

The judgment of the Court below was dated and entered on July 22, 1981. A petition for rehearing was denied on August 21, 1981. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

8 U.S.C. § 1325 (1976) provides:

> "Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

8 U.S.C. § 1357(a)(1976) provides:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant –

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he

has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens."

## STATEMENT

Blackie's House of Beef, Inc. ("Blackie's"), the petitioner, operates the Blackie's House of Beef Restaurant and Deja Vu Cocktail Lounge located at 22nd and M Streets, N.W., Washington, D.C. On four occasions, the respondents, agents of the Immigration and Naturalization Service ("INS"), have searched Blackie's premises to locate and seize deportable aliens. *Blackie's House of Beef, Inc. v. Leonel J. Castillo, et al.*, 480 F. Supp. 1078, 1081 (D.D.C. 1979) (hereinafter Blackie's II). The first two searches were conducted without any warrants whatsoever. *Id.* The last two searches on March 30, 1978 and November 17, 1978, were challenged by Blackie's and were declared to be illegal by the District Court. *Id.*

The March 30, 1978 search involved approproximately ten agents of the INS who surrounded and entered Blackie's restaurant during the dinner period, which intrusion, Blackie's claimed, disrupted its business and interfered with service to its patrons for several hours.

The INS obtained a search warrant relying upon Rule 41 of the Federal Rules of Criminal Procedure to authorize a search and seizure of aliens who entered the United States

illegally in violation of criminal and immigration laws, 8 U.S.C. §§ 1325, 1251(a)(2). However, five of the fifteen aliens seized entered this country legally. *Blackie's House of Beef v. Castillo*, 467 F. Supp. 170, 171 (D.D.C. 1978) (hereinafter "Blackie's I").

A month after the District Court declared the March 1978 search unlawful and the warrant defective, the INS again searched Blackie's premises. *Blackie's II*, 480 F. Supp. at 1081. The application for the search sought to invoke the Court's general jurisdiction under the Immigration and Nationality Act and made no reference to Federal Criminal Rule 41. *Id.* It requested authority to search the restaurant for deportable aliens and asserted probable cause to believe that such persons were present there. *Id.* at 1081-82.

The supporting affidavits related the first names of six allegedly deportable Spanish-speaking aliens likely to be present at Blackie's restaurant. *Id.* Yet, on the return, only two of the names, "Manuel" and "Jose", matched with the names given. Appendix F. The affidavits variously claimed that Blackie's employed from eight to thirty deportable aliens who were believed to be of Hispanic descent, some of whom were dressed in a manner believed by the affiant to be typical of such persons. 480 F. Supp. at 1082.

The warrant itself, however, bore no names, first or otherwise, nor any other identifying descriptions of any aliens for whom the search was authorized. *Id.* It gave the persons executing the warrant or those subject to it no direction as to whether the objects of the search in the restaurant were employees, patrons, or passersby. *Id.* The warrant did not indicate the number of allegedly deportable aliens involved. *Id.* It broadly authorized an entry

and search of all areas on Blackie's premises and did not exclude the restaurant's private business offices on the second floor where aliens worked. 480 F. Supp. at 1090; Affidavit of Mary Elstein attached to Plaintiff's Memorandum in Opposition to Motion to Dismiss, *Blackie's II,* App. H.

The INS executed the warrant by entering Blackie's restaurant with a squad-sized force, interrogating suspects, seizing fourteen of at least seventeen persons questioned, handcuffing and removing them from the restaurant when Blackie's employees were preparing to serve lunch to patrons. *Id.* at 1083, 1086. During the raid, the INS officers chased employees, grappling with one at the entrance way, and searched Blackie's private business offices on the second floor where no aliens were found. Affidavit of Mary Elstein, *supra.* This commotion occurred while at least ten and later fourteen patrons were present. 480 F. Supp. at 1083.

The warrant made no reference to the scope of Blackie's business or the interests of employees and patrons who might be in the restaurant innocently and legitimately at the time of the search. 480 F. Supp. at 1082. There was no recital on the face of the warrant that the Magistrate or anyone else had considered what effect the search would have upon innocent persons. *Id.*

Blackie's subsequently filed a second suit for declaratory, injunctive, and monetary relief against officers of the Immigration and Naturalization Service for intruding upon and disrupting its business operations and for violating its Fourth Amendment rights. Jurisdiction of the Court was based upon 8 U.S..C § 1329 (1976) and 28 U.S.C. § 1331 (1976).

The District Court ruled by summary judgment that the Magistrate had jurisdiction to issue the warrant, but that it

was defective for failing to describe with "particularity" the persons to be seized as required by the Fourth Amendment and for failing to reflect that the Magistrate had adequately considered the competing interests involved. 480 F. Supp. 1078. Once inside the premises, the INS could not rely upon the "plain view" exception to the warrant requirement, nor upon its statutory authority to interrogate and arrest, since, in this instance, the discovery and seizure were the planned and intended result of the search. *Id.* at 1087, 1090. The Court also enjoined the INS from further searches for aliens on Blackie's premises without first obtaining an order or warrant which particularly describes the person to be seized and reflects adequate consideration of the effects of the execution of the warrant upon the interests involved. *Id.* at 1090.

On appeal, the Court of Appeals affirmed *Blackie's I* (for reasons other than those relied upon by the District Court, but reversed *Blackie's II),* holding that the INS had authority to search pursuant to a civil search warrant requiring a lesser standard of probable cause. It further held that the warrant sufficiently protected Blackie's Fourth Amendment rights while aiding the enforcement interests of the United States. A petition for rehearing was denied on August 21, 1981.

Petition for writ of certiorari is now sought for review of *Blackie's II.*

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### I. THE IMMIGRATION AND NATURALIZATION SERVICE HAD NO AUTHORITY TO OBTAIN AND EXECUTE A CIVIL SEARCH WARRANT FOR PRIVATE BUILDINGS FAR FROM THE BORDER.

No statute or regulation authorizes the INS to obtain a civil warrant, much less to search the non-public areas of a private commercial building far removed from the border. See 8 U.S.C. § 1357(a)(3), § 287(a)(3) of the Immigration and Nationality Act ("INA"). Nor has the Supreme Court sanctioned the use of civil warrants by INS to search beyond international land border areas. *Almeida-Sanchez v. United States,* 413 U.S. 266, 283-85 (1973) (Powell, J., concurring).

The Court of Appeals strives mightily to overcome and to expand the plain wording of the pertinent statute. Title 8, Section 1357(a)(3) of the United States Code specifically authorizes immigration officers within a reasonable distance from any external border to:

> "(a) board and search any vessels within the territorial waters of the United States;
>
> (b) board and search any railway car, aircraft, conveyance or vehicle, and
>
> (c) within a distance of twenty-five miles from any external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry into the United States."

No authority is granted to immigration officials to enter homes or commercial buildings to search for aliens, especially in nonborder areas such as Washington, D.C.

The Court of Appeals' assertion that the authority to obtain a civil search warrant in this case can simply be *implied* from 8 U.S.C. 1357(a) ignores the cardinal rule of statutory interpretation that a statute means what it says. *United States v. Atchison T. & S.F.R. Co.*, 220 U.S. 37, 44 (1910) (Holmes, J.). Further, the analysis of the Court of Appeals flies in the face of specific statutory authority which Congress has granted a myriad of other agencies (with specific provisions for judicial intervention) to enter and search commercial premises. *See, e.g.*, for occupational and safety inspection, 29 U.S.C. § 657(a) (1970), *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); for mine inspection, 30 U.S.C. §§ 723, 733(a) (1970); for inspection under the Animal Welfare Act, 7 U.S.C. § 2146(a)(c)(1976); for meat and cattle inspection, 21 U.S.C. §§ 603, 674 (1976); for food, drug, and cosmetic inspection, 21 U.S.C. § 374 (1976); for natural gas inspection, 49 U.S.C. §§ 1677, 1679(a)(1970); or for issuance of writs and decrees to enforce the Internal Revenue Code, 26 U.S.C. § 7402(a)(1979).

These statutes listed above establish a clear pattern of Congressional concern to carefully circumscribe the limits of agency authority in the sensitive area of Fourth Amendment searches. There is no reason to believe that Congress intended to depart from this pattern.

This liberal license for expanded searches by immigration officials justified by the Court of Appeals by the public interest in effective immigration enforcement. *Castillo v. Blackie's House of Beef*, Nos. 79-1057, 2358 (D.C. Cir. July 22, 1981) slip op. at 21, cannot be a substitute for specific statutory authority. Indeed, all the areas of health and safety enforcement previously listed

involve great public concern, yet Congress has still clearly delineated civil search and warrant powers.

The Court of Appeals considers the flurry of bills imposing sanctions on employers who knowingly hire illegal aliens, introduced into Congress in recent years, as lending support for its position. *Castillo v. Blackie's House of Beef, Inc., supra*, at 18-19 n. 10. On the contrary, the fact that Congress has repeatedly refused to pass such legislation strongly suggests that Congress does not wish for immigration authorities to interfere with the workplace.

Another crucial question of federal law to be settled on certiorari is the scope and meaning of this Court's decision in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), and, especially, the concurring opinion of Justice Powell, 413 U.S. at 275. The Courts below in the instant case thought that this Court's decision in *Almeida-Sanchez* authorized issuance of a warrant to search Blackie's business, a privately-operated commercial office building and restaurant far from the border.

The majority opinion in *Almeida-Sanchez* does not state that the INS has the authority to seek a civil warrant. At best, the concurring opinion of Justice Powell, upon which the Courts below rely, suggested that it might be feasible "to obtain advance judicial approval to conduct roving searches on a particular road or roads" near the border for the purpose of inspecting vehicles to locate illegal aliens, especially those being smuggled into the United States. *Almeida-Sanchez v. United States,* 413 U.S. at 283. This is not the situation in the instant case and, therefore, reliance on Justice Powell's opinion was misplaced.

Even if somehow the INS had authority to seek a civil search warrant, the individual officers involved had no ex-

press authority pursuant to regulation to obtain or execute any civil search warrant, nor had they been delegated any of the Attorney General's powers to enforce the INA pursuant to 8 U.S.C. § 1103. Neither were rulemaking procedures followed under the Administrative Procedure Act [4 U.S.C. § 552(a)(1)(C),(D), § 553 (1976)] to permit such an exercise of power. It was incumbent upon the INS to promulgate such a regulation. Cf. 29 C.F.R. § 1903.4 (1980) [providing for compulsory process (warrant) for administrative searches in Occupational Safety and Health Act of 1970 cases].

Further, if search warrant authority is derived from 8 U.S.C. § 1357(a)(1), as the Court of Appeals suggests, subsection (a) expressly requires promulgation of regulations to implant paragraph (1):

> "Any officer or employee of the Service authorized *under regulations* prescribed by the Attorney General shall have power***"
> (Emphasis added.)

8 U.S.C. § 1357(a). The Court of Appeals completely overlooked this essential requirement. Without any implementing regulations to obtain and execute the search warrant, *sub judice,* the immigration officers acted without lawful authority and the warrant was illegally obtained.

## II. THE SEARCH FOR ALIENS PURSUANT TO A WARRANT BY OFFICERS OF THE IMMIGRATION AND NATURALIZATION SERVICE REQUIRES PROBABLE CAUSE.

In *Almeida-Sanchez v. United States, supra,* and its progeny, *United States v. Bignoni-Ponce,* 422 U.S. 873 (1975); *United States v. Ortiz,* 422 U.S. 891 (1975); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); and

*United States v. Cortez*, 449 U.S. 411 (1981), the Supreme Court has clearly set the standard for searches by immigration officers to be based upon full probable cause. For example, this Court in *Almeida-Sanchez* specifically rejected the application of the administrative search standard of "less than probable cause to believe that particular dwellings were sites of particular violations" which was developed in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967), and stated emphatically:

> "In seeking a rationale for the validity of the search in this case, the Government thus understandably sidesteps the automobile search cases. Instead, the Government relies heavily on cases dealing with administrative inspections. *But these cases fail to support the constitutionality of this search.*
> (Emphasis added.)

413 U.S. at 270.

What the Court of Appeals confused and the Government cleverly urged below, was that the concurrence of Justice Powell in *Almeida-Sanchez, supra*, suggesting a lesser standard of probable cause for immigration searches, was the position of the majority of the Supreme Court. The Supreme Court has never so held. Indeed, the subsequent case of *United States v. Ortiz, supra*, supports the vitality of the probable cause requirement enunciated by the majority opinion of *Almeida-Sanchez, supra*. Mr. Justice Powell, writing for the majority of six Justices in *Ortiz*, stated:

> "In *Almeida-Sanchez* we rejected the Government's contention that the Nation's strong interest in controlling immigration and the practical difficulties of policing the Mexican border

> combined to justify dispensing with both warrant and *probable cause* for vehicular searches by roving patrols near the border. (Emphasis added.)

422 U.S. at 892.

And that opinion states further:

> "This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search of an automobile is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded *probable cause* as the minimum requirement for a lawful search. *Almeida-Sanchez,* 413 U.S. at 269-270. (Emphasis added.)
>
> *** ***
>
> We therefore follow [*Almeida-Sanchez*] and hold that at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or *probable cause.*" (Emphasis added; citation and footnotes omitted.)

422 U.S. at 896-97.

The Court of Appeals below seeks a large measure of support from *Marshall v. Barlows, Inc.,* 436 U.S. 307 (1978), as the guiding standard for the search involving Blackie's restaurant and offices. Blackie's urges that *Marshall v. Barlows, Inc.* is inapplicable, especially since the Supreme Court has firmly rejected in immigration searches the application of the administrative search standards of *Camara, supra,* and *See, supra,* upon which *Marshall*

*v. Barlows, Inc., supra*, is derived. See *Almeida-Sanchez, supra; Ortiz, supra.*

Without discussing the probable cause standard which this Court has set in immigration search cases, the Court of Appeals simply relies upon the maxim that deportation proceedings are civil, not criminal in nature, citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Since the aliens seized at Blackie's restaurant were deportable, the Court reasoned, any search for them would be a civil administrative search, and therefore administrative search standards apply. This analysis is flawed for several reasons. First, it ignores the probable cause standard for immigration searches established in *Almeida-Sanchez, supra,* and *Ortiz, supra*. Second, it is without question that the immigration officer is cloaked with specific statutory authority to make criminal arrests relating to aliens, namely:

> "[T]o make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens***"

8 U.S.C. § 1357.

Finally, the Immigration and Nationality Act ("INA") includes an array of criminal violations which immigration officers enforce. See §§ 271-278 INA, 8 U.S.C. §§ 1321-1328 (1976). Section 275 of INA, in particular, provides for criminal penalties for an alien entering the United States without inspection. It was the suspicion that the aliens on Blackie's premises had entered without inspection which provided the basis for the criminal warrant in *Blackie's I*. Of the fifteen arrested in that case, ten were found to be in this country illegally, Government's Appeal Brief at 5, and all ten had entered without inspection. See

467 F.Supp. at 176-77. This strongly suggests that the Immigration Service suspected to find further EWI cases in the subsequent search in *Blackie's II.* In fact the Government knew of criminal entry violations from the affidavit of the Government informant, supporting the search warrant in *Blackie's II,* which refers to the aliens being illegal because they were "from El Salvador illegally without a passport, visa, or social security number." App. F. Also, Affidavit of Russell G. Parry, Jr., ¶1, App. G. Where the Immigration Service would be searching for and arresting suspected violators of criminal and civil laws under the warrant in *Blackie's II,* a civil standard of probable cause fashioned by the Court of Appeals is totally inappropriate.

## III. THE CASE OF *MARSHALL v. BARLOW'S, INC.*, 436 U.S. 307 (1978) PERMITTING LESS STRINGENT STANDARDS FOR PROBABLE CAUSE FOR ADMINISTRATIVE SEARCHES, DID NOT ALTER THE FOURTH AMENDMENT'S COMMAND THAT WARRANT MUST "PARTICULARLY DESCRIBE *** THE PERSONS TO BE SEIZED."

The Court of Appeals misapprehends the language of the Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which applied a relaxed standard of probable cause in administrative search cases. While the Supreme Court's administrative search standard of probable cause may permit less extensive evidence to establish the likelihood that the item to be seized is on the premises

[1]The "EWI" notation, following the country of citizenship on the "Return" of the warrant in *Blackie's I*, 467 F. Supp at 176-77, is a common abbreviation used by the INS in referring to "entry without inspection," a criminal offense under § 275 of the INA, *supra,* as well as a deportable offense under § 241 (a)(2) of the INA, 8 U.S.C. 1251(a)(2).

described in the warrant, it does not, as the Court of Appeals would suggest, eliminate the Fourth Amendment's unambiguous language that search warrants must "particularly describe *** the person to be seized." "Probable cause" and "particularity of description" are distinct aspects of the requirements for issuance of a warrant under the Fourth Amendment. Each focuses upon different considerations. They cannot be equated. A warrant must satisfy *both* the probable cause requirement and the particularity requirement, not simply the former. *In Re Search Warrant*, 436 F. Supp. 689, 696 (D.D.C. 1977), *vacated on other grounds,* 572 F. 2d 321 (D.C. Cir. 1977), *cert. denied sub nom., Founding Church of Scientology v. United States*, 435 U.S. 925 (1978).

If the Court of Appeals meant to say that some particularly is required, but less than that required in criminal search warrants, it has not so stated. Even under a lesser standard, the warrant in *Blackie's II* fails, as not even some particularity of persons to be seized is provided.

The Court of Appeals excuses the lack of particularity in the warrant, concluding that it is impossible to obtain specific information concerning illegal aliens. *Castillo v. Blackie's House of Beef, Inc., supra,* slip op. at 28. The record in the instant case belies this unsupported finding. Here, the Government's informant allegedly was able to befriend the illegal aliens who worked at Blackie's restaurant, knew their names, spoke with them in the neighborhood, and, further, was easily taken into their confidence concerning their unlawful status. See Affidavit of Government Informant, App. F. Moreover, INS agents on three occasions, while staking out the restaurant, saw persons they identified as aliens, and were, according to their affidavits, close enough to hear them speak Spanish. See App. G. If they were that close, the

agents certainly could have observed particular distinguishing physical characteristics rather than that they merely appeared Hispanic or foreign-looking. No physical descriptions at all are provided in the warrant, yet identifying information that was known to the Immigration Service through its agents and informant could and should have been included in the warrant and affidavits.

Amazingly, the open-ended warrant in *Blackie's II* authorizing the search for "any alien in the United States without legal authority" does not limit the search to just the alien restaurant employees referred to in the affidavits supporting the warrant. It includes anyone else who the INS believes to be an illegal alien, such as patrons or passersby, despite the absence of *any* probable cause, administrative or otherwise, to authorize a warrant to issue for this extended search.

In addition to the restaurant and lounge area on the first floor, the warrant and ensuing search encompassed the private second floor offices of the owner, where no aliens worked or were found. See Statement, *supra,* at 6. The search order permitted the immigration officers to search the entire building and apprehend individuals with unfettered discretion. In encompassed all persons who had a foreign appearance or spoke a foreign language. It was precisely this type of general warrant which was condemned by the Supreme Court when it stated:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible *** As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

*Marron v. United States,* 275 U.S. 192, 196 (1927). Thus, "open-ended" or "general" warrants are constitutionally prohibited. *Ybarra v. Illinois,* 444 U.S. at 92 n. 4, *reh.*

*denied*, 444 U.S. 1049 (1980), citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Stanford v. Texas*, 379 U.S. 476, 480-82 (1965).

## IV. THE CASE SHOULD BE REMANDED FOR A THOROUGH CONSIDERATION OF THE SUFFICIENCY OF THE SEARCH WARRANT UNDER THE NEW GUIDELINES ANNOUNCED BY THE COURT OF APPEALS.

A remand of the case would be appropriate in order to give the plaintiff an opportunity, consistent with fundamental procedural due process, to fully develop the record in light of the Court of Appeals' new standards for issuance of a civil immigration warrant and to have the District Court judge the facts under these new standards.

The reliability of information from the informant which heavily influenced the Court of Appeals' determination that probable cause existed to support the warrant in *Blackie's II*, was not at issue and was immaterial under the Fourth Amendment standards by which the District Court assessed the warrant.

For example, the credibility and reliability of the Government's informant have not been closely scrutinized. See *Aguilar v. Texas*, 378 U.S. 108 (1964). His affidavit has serious inconsistencies including the numerous names of alleged illegal aliens working at Blackie's whom he brought to the attention of the INS, but who were not among those actually seized. See Ap. F. There is no recitation that the informant was fluent in Spanish in order to fully understand what he heard from the alleged Spanish-speaking illegal aliens working at Blackie's. Cf. *United States v. Karanthos*, 531 F. 2d 26, 30 (2nd Cir.), *cert.*

*denied,* 428 U.S. 910 (1976). His affidavit appears to be handwritten in English by the immigration officer rather than written by the informant himself. These obvious discrepancies call into question the reliability of the information. *Spinelli v. U.S.,* 393 U.S. 410 (1969).

Further, contrary to the Court of Appeals' finding in *Castillo v. Blackie's House of Beef, Inc., supra,* at 32 n. 17, the Government's informant did *not* work at Blackie's nor did he have any first hand knowledge of the physical layout of Blackie's to reliably state where he thought illegal aliens were hidden. The affiant's statements describing where illegal aliens hide appear nothing more than fabrications.

Finally, Blackie's does not understand the Court of Appeals' statement at page 32 of its opinion that the warrant was exhaustively supported by two day-long surveillances of Blackie's. The affidavit of the Supervisory Criminal Investigator, Russell G. Parry, Jr., refers to only three periods of observation amounting to a total of three hours. See App. G.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 79-1057 et al.

BLACKIE'S HOUSE OF BEEF, INC.

v.

LEONEL J. CASTILLO,
COMMISSIONER OF THE IMMIGRATION
AND NATURALIZATION SERVICE, ET AL.,
APPELLANTS

---

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 78-0787 and 78-2338)

---

Argued March 5, 1981

Decided July 22, 1981

Judgment entered
this date

*Julian S. Greenspun*, Attorney, Department of Justice, with whom *Eric A. Fisher* and *James M. Cole*, Attorneys, Department of Justice, were on the brief for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*John A. Terry, Dennis A. Dutterer*, Assistant United States Attorneys and *Lauren S. Kahn*, Attorney, Department of Justice, also entered appearances for appellants.

*Thomas A. Elliott* with whom *Mark A. Mancini* was on the brief for appellee.

Before McGOWAN, EDWARDS, and GINSBURG, *Circuit Judges.*

Opinion for the Court filed by McGOWAN, *Circuit Judge.*

McGOWAN, *Circuit Judge*: These consolidated appeals present the important question of when agents of the Immigration and Naturalization Service ("INS") may obtain a warrant to enter a commercial establishment to question employees suspected of entering the United States illegally. In No. 79-1057, the Government appeals the District Court's ruling that the INS may not obtain a search warrant issued on the authority of Rule 41, Fed. R. Crim. P. In No. 79-2358, the Government appeals the District Court's ruling that a search warrant which fails to contain a "particularized description" of each suspected illegal alien is insufficient under the fourth amendment to support an INS search.

We affirm in No. 79-1057, but for reasons which differ from those stated by the District Court. With respect to No. 79-2358, however, we have concluded that a warrant authorizing an INS search of a commercial establishment is in essence a civil administrative warrant which need only be supported by the level of particularized description present in this case; and, accordingly, we reverse.

I

The economy of the United States "has traditionally served as a giant magnet drawing the less fortunate

from all over the world," [1] perhaps never more conspicuously so than in the decades following the second World War, when political and economic upheavals have become commonplace even in previously placid parts of the world. More recently, the problem of illegal immigration has accelerated, coinciding with the simultaneous occurrence in this country of persistent inflation and widespread unemployment.

One unexceptionable response to this problem is strict enforcement of the laws presently made and provided by the Congress, which in turn depends upon greater vigilance with respect to the detection of illegal aliens.[2] Two such attempts to increase the effectiveness of INS law enforcement in Washington, D.C. are the sources of the appeals before us.

Blackie's House of Beef, Inc. ("Blackie's"), plaintiff-appellee, operates the Blackie's House of Beef Restaurant and Deja Vu Cocktail Lounge located in Washington, D.C. The Immigration and Naturalization Service ("INS"), defendant-appellant, is the federal agency charged with enforcement of federal immigration laws. Through its limited number of agents, the INS is empowered, *inter alia*,

> without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien . . . in the United States, if he [the INS agent] has reason to believe that the

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[1] Fragomeni, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 San Diego L. Rev. 82, 83 (1975).

[2] The term "illegal alien" refers to a foreign national who enters or remains in the United States in violation of 8 U.S.C. §§ 1101-1503 (Supp. III 1979).

> alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . .

8 U.S.C. § 1357 (a) (1) & (2) (Supp. III 1979).

In 1976, the INS began to receive information that illegal aliens were employed at Blackie's. One such indication was a sworn statement by an illegal alien who had been apprehended by the INS and was in the process of undergoing deportation hearings. This informant swore that he had worked at Blackie's and, furthermore, that he had personal knowledge that approximately 20 other illegal aliens were currently employed there. (App. 8). Another such affidavit was executed by an apprehended alien claiming to have worked at Blackie's. In addition to verifying the information provided in the first affidavit, the second informant indicated that "there were many Hispanics employed there and that the names of two illegal aliens who worked there were Rogelio and Pedro." (App. 9, ¶ 2). Other information included three anonymous telephone calls in which informants notified the INS that Blackie's was employing illegal aliens. (App. 9, ¶ 3, 5, 6). Finally, INS officers apprehended two illegal aliens who were carrying wage statements from Blackie's. (App. 9, 10). The latter of the two swore by affidavit that Blackie's was employing illegal aliens from El Salvador and Africa, and supplied the first names of three such employees (App. 10).

On the basis of this information, INS Agent Foster twice asked the owner and manager of Blackie's for permission to enter the restaurant and question suspected illegal aliens. Ulysses "Blackie" Auger twice refused such consent. (App. 10, ¶ 8). After receiving the last of the above-described tips, Agent Foster again requested Auger's consent, which was again refused. (App. 10, ¶ 10).

On March 17, 1978, Agent Foster presented the assembled evidence and accompanying affidavits to a federal magistrate, asking that "a search warrant be issued to any Agent of the Immigration and Naturalization Service authorizing him or them to enter with proper assistance . . . [Blackie's] and there to search for and arrest the individuals subject to arrest pursuant to Title 8, United States Code, Section 1357." (App. 10). On March 27, 1978, the magistrate issued the requested warrant, which provided that INS agents might, within five days of the issuance of the warrant, search the "entire premises of Blackie's House of Beef" because "there is now being concealed certain persons namely Aliens who are believed to be in the United States in violation of . . . Title 8, Section 1325 and Section 241(a)(2)." (App. 13). It was a standard form warrant, with the word "property" marked out and the word "persons" inserted in the above-quoted passage and in a subsequent passage providing that "there is probable cause to believe that the *persons* so described are being concealed on the person or premises above described." (App. 13) (emphasis added).[3]

On March 30, 1978, INS agents executed the warrant, entering Blackie's Restaurant during the dinner hour. (App. 14). As noted on the return document, 15 em-

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[3] On the bottom portion of the warrant, the magistrate failed to change the word "property" to "persons" in several instances. Therefore, the bottom portion of the warrant orders the agents to seize the "property described above." Inasmuch as the top portion of the warrant orders agents to enter Blackie's for the purpose of questioning aliens, we think the allusions to "property" in the concluding provision of the warrant are most reasonably interpreted as the magistrate's oversights. The district judge thought otherwise, however, and found that the warrant could most reasonably be interpreted as an order to search and seize property. Since we affirm *Blackie's I* on other grounds, we do not reach this issue. *See* text accompanying notes 18 & 19 *infra*.

ployees were seized, at least 10 of whom proved to be illegal aliens subject to deportation. (App. 15).

Blackie's subsequently filed suit in the District Court for a declaratory judgment, injunctive relief, and damages, alleging that the search warrant was not supported by probable cause and thus violated the fourth amendment. In a memorandum opinion issued October 5, 1978, the District Court agreed that the warrant was invalid. *Blackie's House of Beef, Inc. v. Castillo*, Civ. No. 78-787 (D.D.C. filed October 5, 1978) [hereinafter *"Blackie's I"*]. Recognizing that the word 'property' had been scratched out on the upper portion of the warrant, the court was nevertheless impressed by the bottom portion of the warrant, which directed INS agents to search

> the person or place named for the *property* specified, . . . and if the property be found there to seize it, leaving a copy of this warrant and receipt for the *property* taken, and prepare a written inventory of the *property* seized and promptly return this warrant.

(App. 13) (emphasis added). From this, the court concluded that the warrant most nearly resembled a warrant for the seizure of property, and was invalid inasmuch as it had been used to authorize a search for persons. *See* note 3 *supra*. Furthermore, the court interpreted Rule 41, Fed. R. Crim. P., as only authorizing the issuance of search warrants to seize *property*. Therefore, the court concluded, the magistrate's reliance on Rule 41 was misplaced in any event.[4]

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[4] The memorandum opinion of the District Court granted Blackie's motion for summary judgment and stated that a judgment would be entered declaring the defendants' entry and search to be unlawful. It further stated that a hearing would be scheduled in due course to address the issues of (1) the damages, if any, to which Blackie's may be entitled

The INS continued to receive information that illegal aliens were being employed at Blackie's. The information—that upwards of 30 illegal aliens were currently employed at Blackie's—was supplied in an affidavit, dated October 27, 1978, by a previously reliable source. (App. 45-46). The affiant was quite specific, revealing names of suspected illegal aliens, explanations as to how he knew the suspects to be illegal aliens, and details as to the places in which such persons might be hiding. *Id.*

To supplement this information, INS Agent Parry then surveyed Blackie's restaurant for several hours on October 23 and 24, 1978, and observed employees working both inside and outside the restaurant, eighteen of whom Parry believed to be aliens of Hispanic descent, principally because of their attire and seeming inability to speak any language but Spanish. (App. 43, ¶ 4). In addition, Agent Riordan staked out Blackie's on October 27, and observed numerous persons of apparent Hispanic descent entering through the back doors of the restaurant. (App. 43, ¶ 5).

Parry also stated that Blackie's was a known employer of illegal aliens. In support of this assertion, it was said that INS records showed that 48 illegal aliens employed by Blackie's have been apprehended by the Service since

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and (2) conduct by Blackie's, if any, which may bar equitable relief.

On October 13, 1978, two stipulations were entered into by the parties. One fixed the total damages, if any, at one dollar, with no concession by defendants of liability. The other agreed that the action, as to the individually sued defendants, be dismissed with prejudice.

The final order and judgment issued by the District Court reflected the declaratory relief referred to above and the aforementioned dismissal with prejudice. It further provided that Blackie's prayer for injunctive relief was denied without prejudice.

January 30, 1974. Further, attached to the affidavit was a recent *Washington Post* news story which reported the manager of Blackie's as having said that he hires foreign workers because of their reliability and that he does not demand to see their green cards (proof of legal immigrant status) except in Virginia. (App. 43, ¶ 6).

Armed with this information, the INS sought another warrant to search Blackie's. This time the INS claimed to derive its power to search not from Rule 41 but from its general powers to question aliens and to enforce the immigration laws. 8 U.S.C. §§ 1357, 1103(a) (Supp. III 1979).

On November 16, 1978, the magistrate issued a warrant, concluding that the INS had established probable cause to believe illegal aliens were present on Blackie's premises. (App. 40-41). Unlike the first warrant, this was not a form warrant, and Rule 41 was nowhere mentioned. Rather, the authority to search was premised upon sections 1357 and 1103 of the Immigration and Nationality Act, and the warrant was entitled "Order For Entry on Premises to Search for Aliens in the United States Without Legal Authority." (App. 40).

The warrant directed the INS to "enter the premises located on 22nd and M Street, North West, Washington, D.C., in order to search for persons believed to be aliens in the United States without legal authority." (App. 40). The magistrate limited the INS's search to "the daylight hours and within 10 days of this order," and required a return within 10 days after completion of the search. (App. 41). The area for permissible search included "any locked rooms on the premises in order to locate aliens in the United States without legal authority." (App. 40-41).

On November 17, 1978, INS agents conducted a search of the public area, kitchen, and second-floor offices of Blackie's beginning at 11:12 A.M. and continuing for

23 minutes. During the 23-minute search, the INS removed 14 suspected illegal aliens from Blackie's, who were detained for an additional 10 minutes in an alley behind the restaurant while transportation to the local INS office was being arranged. The required warrant return was made on November 20, 1978, reciting the names and country of origin of 14 illegal aliens found on the premises. Ten patrons were observed in the restaurant during the search, and four more came in during the course of it.

Blackie's again filed suit for injunctive and declaratory relief, and for damages in the amount of $500,000, alleging that this second warrant violated the fourth amendment and that the search as executed was disruptive and exceeded all reasonable limits. Again the District Court, on defendants' motion to dismiss and cross-motions for summary judgment, held the warrant invalid, ruling that this second warrant failed to satisfy the fourth amendment requirement that "no Warrant shall issue, but upon probable cause, . . . *particularly describing . . . the persons or things to be seized*" (emphasis added), because it failed to describe with particularity each alien sought. The court also objected to the magistrate's failure to signify, on the face of the warrant, that the magistrate had balanced the enforcement interests of the INS against the privacy interests of Blackie's, its employees, and its patrons. The district judge enjoined the INS from entering plaintiff's premises (except in exigent circumstances) without a warrant complying with the standards set forth in his second memorandum opinion. *Blackie's House of Beef, Inc. v. Castillo*, Civ. No. 78-2338 (D.D.C. filed Oct. 5, 1979) [hereinafter "*Blackie's II*"]. The plaintiff's actions against the defendants in their individual capacities were dismissed with prejudice.

The United States appealed the District Court's rulings in *Blackie's I* and *II*, arguing that both search warrants were valid under the fourth amendment and Rule 41. We consolidated the cases for hearing and decision.[5]

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[5] The Government has urged upon us the position that Blackie's does not have standing to challenge the entry onto its premises because it was not the target of the investigation. We agree with the District Court that this argument has no merit. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the Supreme Court flatly rejected the argument that the fourth amendment is less protective of the interests of third parties than of the actual target of an investigation. *Id.* at 555-56, 570 n.2. This principle was recently reaffirmed and amplified in Steagald v. United States, 49 U.S.L.W. 4418, 4420-23 (Apr. 21, 1981).

The Government has also urged that Blackie's should not be allowed to assert the insufficiency of the warrant as to its description of the persons to be searched; in other words, the Government argues that, even if the warrant had been insufficiently particularized as to the persons sought, it was sufficient as to the place to be searched (Blackie's), and therefore appellant's fourth amendment rights have not been violated. We disagree.

To be a valid infringement upon anyone's privacy, a search warrant must be supported by probable cause and, as the Supreme Court recently noted in Steagald v. United States, 49 U.S.L.W. at 4420, this means probable cause to believe that (1) the legitimate object of a search is (2) located in a particular place. If there is insufficient evidence as to either of these questions, the warrant is insufficient to justify the invasion of privacy.

The fact that Blackie's is a commercial and not a private establishment does not, in our view, destroy Blackie's standing to challenge the entry on its premises. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), established that a warrant is as necessary to support an entry onto commercial premises as onto private premises, except in rare circumstances. *See* text accompanying note 14 *infra*. This fact may, however, affect the type of evidence that constitutes probable cause to obtain a search warrant in the particular case. *See* notes 14-16 and accompanying text *infra*.

## II

Our task on appeal is to determine whether either or both of the warrants were sufficient to protect the fourth amendment rights of Blackie's. Neither party challenges the proposition that a warrant was necessary to support the INS searches of Blackie's premises. We agree that, in light of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the applicability of the Warrant Clause of the fourth amendment to INS enforcement activities can no longer be doubted.

The District Court focused on completely different aspects of the problem in its two memorandum opinions, properly refusing to reach the issue of whether the INS may obtain a hybrid "administrative warrant" upon a lesser showing of probable cause until that issue was squarely presented in *Blackie's II*. Therefore, we are confronted with two distinct questions on appeal. The first, in *Blackie's I*, is primarily a question of statutory construction, *i.e.*, whether the INS may rely upon Rule 41, Fed. R. Crim. P., to obtain a search warrant, given that INS investigations are conducted pursuant to a civil law enforcement power. In *Blackie's II*, the issue is, first, the authority of the INS to seek, and of the District Court to grant, authority by warrant for access to commercial premises to question persons believed to be *aliens* as to their status, and second, the level of probable cause required for such a warrant.

We address first the issue in *Blackie's II*. Our analysis leading to reversal of the District Court in that case, establishing that warrants to search premises for illegal aliens are civil (administrative) in nature, compels affirmance of *Blackie's I* because the INS's proceeding there under Rule 41 was inappropriate.

### A. Blackie's II

The fourth amendment prohibits "unreasonable searches and seizures," requiring that "no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The warrant procedure contemplates that the necessity for every intrusion upon the privacy of an individual first be considered by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). This prior consideration must be more than *pro forma*: "[T]he magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant." *Zurcher v. Stanford Daily*, 436 U.S. at 570 (Powell, J., concurring). Our task in this case is to determine whether this warrant reflects careful and informed consideration by the magistrate, and reasonably "advise[s] the [subject] of the scope and objects of the search, beyond which limits the [officer] is not expected to proceed," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

The District Court declared the warrant in *Blackie's II* invalid, holding that a warrant authorizing an INS search for illegal aliens must meet the same standard of probable cause as is required to support a warrant for criminal investigation. The court objected to the absense of any "particularized description" of the individual aliens sought and to the magistrate's failure to balance, on the face of the warrant, the enforcement interests of the Government against the privacy interests of Blackie's, its employees, and its patrons. In the court's characterization:

> It [the warrant] does not contain any names or even physical descriptions of the allegedly deportable aliens; it does not enumerate the persons sought or

> indicate whether these persons were patrons or employees. The warrant simply confers blanket authority to 'locate aliens in the United States without legal authority.'

(App. 78-9).

The District Court assumed that the "particularized description" requirement enunciated in cases dealing with criminal warrants applies to *all* government searches except a routine administrative inspection conducted by an agency such as OSHA, wherein the agency is empowered by statute to conduct periodic searches of certain regulated industries pursuant to a warrant which need only state "neutral standards" supporting the search. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) [warrant to search building for OSHA violations need not be supported by particularized suspicion as to the presence of violation within that building, but only by neutral standards for industry-wide search which obviate the possibility of discriminatory law enforcement]; *Camara Municipal Court*, 387 U.S. 523, 538 (1967), *quoting Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting) ["Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken."].

By contrast, so it is said, the warrant at issue in the present case did not authorize a "routine inspection," nor was it supported by "neutral principles" promulgated by an agency; rather, it was issued to allow investigation of one specific violation, and so resembled a criminal warrant. The District Court thus concluded that the warrant amounted to exactly the type of "general" criminal warrant that has repeatedly been struck down as placing too much discretion in the hands of law enforce-

ment officers. *See Delaware v. Prouse*, 440 U.S. 648 (1979); *Stanford v. Texas*, 379 U.S. 476, 481-86 (1965). *See generally Marron v. United States*, 275 U.S. 192, 196 (1927) ["As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."].

We think the District Court perceived correctly that the warrant at issue in this case was not comparable to the OSHA "routine inspection" warrant that the Supreme Court found to be constitutionally required in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), because the nature of the two enforcement activities differs significantly. The INS sought to enter Blackie's to search for a particular violation, not to conduct a routine inspection of regulated industry premises, and therefore the "neutral standards" principle is inapposite.

The District Court erred, however, in failing to take this argument one step further and acknowledge that the situation also was not analogous to a criminal investigation. The Supreme Court has explicitly held that the detention and deportation of illegal aliens is not criminal law enforcement activity. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). There are no sanctions of any kind, criminal or otherwise, imposed by law upon a knowing employer of illegal aliens. This warrant in particular was issued to aid the agency in the enforcement of its statutory mandate, not to aid police in the enforcement of criminal laws.

We think that the District Court failed to recognize the unique aspects of an INS search, and thus erroneously concluded that Blackie's fourth amendment rights were violated by the second search warrant. Our decision rests on three determinations. First, we think that Congress, in passing the Immigration and Nationality Act, contemplated a vigorous enforcement program that might include INS entries onto private premises for the purpose of questioning "any alien or person believed to

be an alien," and of detaining those aliens believed to be in this country illegally. Second, since an INS search is conducted pursuant to a civil administrative mandate, the warrant issued to permit such a search may therefore be evaluated under a standard of probable cause different from that applied to criminal warrants. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Last, we hold that the warrant in *Blackie's II* was properly tailored both to protect the fourth amendment rights of Blackie's and to aid the enforcement interests of the United States.

1. INS Authority to Search

In styling the warrant as an "Order for Entry on Premises To Search for Aliens in the United States Without Legal Authority," and in invoking the Immigration and Nationality Act ("the Act") as authority for the search, the magistrate made clear his understanding that the INS gains its authority to search from its general statutory authority to question aliens suspected of entering the United States illegally. The Act does not by its terms authorize INS entries of private premises for this purpose.[6] Nonetheless, we agree with the magistrate that there is ample authority to infer such a power from the general provisions of the Act.

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[6] The Act authorizes the INS to conduct warrantless searches of vessels "within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.S.C. § 1357(a)(3) (Supp. III 1979). It expressly disallows warrantless searches of dwellings. From this, one could infer either that dwellings may never be searched by the INS or that dwellings may never be subjected to warrantless searches or routine inspections. For the reasons set forth below, we adopt the latter interpretation. *See* text accompanying notes 7-13 *infra*.

In 1952, Congress passed the Act in an attempt to deal systematically with its decision to restrict illegal immigration into the United States.[7] The Act outlines the requirements for legal immigration into the United States and those circumstances under which an immigrant is subject to deportation. 8 U.S.C. § 1251, *et seq.* (Supp. III 1979). Of primary importance to this case is section 103(a), 8 U.S.C. § 1103(a) (Supp. III 1979), which grants general enforcement powers to the Attorney General and empowers him to delegate his authority as follows:

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[7] Earlier immigration statutes were enacted piecemeal, usually for the purpose of dealing with some particular immigration problem (*e.g.*, wartime immigration), or else simply to exclude a certain class of immigrants. *See, e.g.*, Act of Feb. 19, 1862, ch. 27. § 2, 12 Stat. 340 [prohibition upon importation of Asian slave labor]; Act of Mar. 3, 1875, ch. 141, § 4, 18 Stat. 477 [prohibition upon importation of alien convicts]; Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58 [prohibition upon importation of contract labor]; Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332 [prohibition upon importation of Chinese labor].

In 1891, deportation was first authorized for aliens entering the United States in violation of law. Act of Mar. 3, 1891, ch. 551, §§ 1, 5, 26 Stat. 1084. In the twentieth century, the basic immigration statutes preceding the Immigration and Nationality Act were the Immigration Act of Feb. 5, 1917, ch. 29, § 1, 39 Stat. 874 (twice vetoed by President Wilson because of its literacy provision) and the Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153 (the basic quota law). These were supplemented by at least 8 further enactments, as well as countless special provisions for war refugees. *See* E. Harper, Immigration Laws of the United States 10-21 (1975). Effective December 24, 1952, the Immigration and Nationality Act, also known as the McCarran-Walter Act, replaced prior enactments, and is the current Immigration and Nationality Act, *see* Wasserman, The Immigration and Nationality Act of 1952, 27 Temp. L.Q. 62 (1952). *See also* E. Harper, Immigration Laws of the United States 4-48 (1975).

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, . . . He shall have control, direction, and supervision of all employees and of all the files and records of the [Immigration and Naturalization] Service. . . . He is authorized, in accordance with the civil-service law, . . . to appoint such employees of the Service as he deems necessary, and to delegate to them . . . any of the duties and powers imposed upon him in this chapter. . .

Section 287, 8 U.S.C. § 1357(a) (Supp. III 1979), then grants INS agents general powers to investigate possible violations:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General *shall have power without warrant*—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation . . . or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation.

(emphasis added).

Together, these statutes reveal Congress's strong interest in effectively enforcing the immigration laws, rather than merely creating a set of normative prohibitions devoid of any means of enforcement. Also significant is INS's vigorous exercise of its enforcement powers, and Congress's failure to cut back on these powers in light of the INS's activities. As the plethora

of INS cases attests,[8] the INS has been as zealous in its pursuit of illegal aliens as is possible, given its considerable manpower limitations and the enormous increase in illegal immigration over the past 20 years.[9] Yet, Congress has never attempted to diminish the INS's powers or in any way to undercut the effectiveness of the enforcement program. On the contrary, Congress has considered supplementing the INS's enforcement powers with a law that would penalize employers who knowingly hire illegal aliens,[10] which in itself attests to the serious-

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[8] *See, e.g.*, Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969). Although the majority of immigration cases arise in the 9th Circuit, the problems, and the litigation arising therefrom, are national in scope, and the Immigration and Naturalization Service conducts operations nationwide. *See* United States v. Barbera, 514 F.2d 294 (2d Cir. 1975); United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Bugarian-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

[9] The manpower problem within the Service has been well documented. *See* H.R. Rep. No. 108, 93d Cong., 1st Sess. 6 (1973).

[10] Several times Congress has considered laws that would make the employment of illegal aliens a crime. Thus far these Acts have failed of passage. In 1972 Congressman Rodino introduced H.R. 16188, which would have provided penalties for the knowing employment of illegal aliens. H.R. Rep. No. 108, 93d Cong., 1st Sess. 4 (1973). It passed the House of Representatives, 118 Cong. Rec. 30185-86 (1973), but was never debated by the Senate or considered by the Senate Judiciary Committee. The bill was reintroduced in January 1973 in essentially the same form, with the number H.R. 982. It passed the House, but again failed to receive much notice in the Senate. 119 Cong. Rec. 14208-09 (1975) [passage in House]. The Bill was reintroduced in 1975, and was reintro-

ness of the public interest in enforcement of the immigration laws.

The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *Almeida-Sanchez v. United*

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duced again in amended form later that year, as number H.R. 8713.

That same year Sen. Kennedy introduced a bill differing from the Rodino bill with respect to the penalties provided. S. 3872, 93d Cong., 2d Sess. (1974), *resubmitted as* S. 561, 94th Cong., 1st Sess. (1975). Sen. Eastland introduced a similar bill in 1976, which differed only in the type of penalties and administrative protections provided. S. 3074, 94th Cong., 2d Sess. (1976). All of these bills failed of passage.

In 1977, President Carter delivered a Presidential Message outlining proposals for the reduction of the flow of illegal aliens into the United States. Central to his scheme was the imposition of penalties on employers who engage in a "pattern or practice" of hiring illegal aliens. President's Message to Congress Proposing Actions to Reduce the Flow of Undocumented Aliens (August 4, 1977), *reprinted in* 134 Cong. Rec. S. 13826 (daily ed. Aug. 4, 1977), at 1171. Sen. Eastland immediately introduced a bill incorporating the President's proposal. S. 2252, 95th Cong., 1st Sess. § 5 (1977). This bill also failed of passage.

Most recently, the Select Commission on Immigration and Refugee Policy, formed by President Carter after S. 2252 failed of passage, recommended the imposition of penalties for the "knowing" employment of illegal aliens. These recommendations are now under review by President Reagan's Task Force on Immigration and Refugee Policy. UPI Dispatch, May 3, 1981.

For discussions of legislation aimed at employers of illegal aliens, *see* Salinas & Torres, The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis, 13 Hous. L. Rev. 863, 900-12 (1976); Comment, Illegal Immigration: Short-Range Solution of Employer Sanctions, 49 Miss. L.J. 659, 681-87 (1978).

*States*, 413 U.S. 266, 276 (1973) (Powell, J., concurring). This court, too, has adverted to the seriousness of the INS enforcement effort, in the context of addressing the constitutionality of section 287. In *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969), this court held that the fourth amendment allows immigration officials to conduct warrantless interrogations of persons reasonably believed to be of alien origin. We reasoned that "the minimum invasion of privacy of the individual approached for questioning was justified by the *special needs of immigration officials to make such interrogations.*" 411 F.2d at 687 (emphasis added), explained in *Au Yi Lau v. INS*, 445 F.2d at 222. In *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971), we were next confronted with the question of whether the INS might temporarily detain a suspected illegal alien for purposes of interrogation. We held that under the standards for temporary detention enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968), the INS might "make forcible detentions of a temporary nature" pursuant to the general investigatory powers described in section 287. *Au Yi Lau v. INS*, 445 F.2d 223.

Underlying these decisions was the understanding that Congress, in passing the Act, clearly contemplated the creation of a mechanism for the vigorous enforcement of its prohibition against illegal immigration. In *Yam*, *Au*, and other cases as well, courts have balanced the government's interest in enforcing the immigration laws against the privacy interests of those whom the INS seeks to investigate.[11] Although courts have, in several

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[11] *E.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) [roving patrol may stop motorists in general area of border for brief inquiry as to residential status]; United States v. Martinez-Fuerte, 428 U.S. 543 (1976) [border patrol's routine stopping of vehicles for brief questions at

instances, ordered the INS to refrain from practices which proved too intrusive under the circumstances,[12] in all such cases it was assumed that the public interest in effective enforcement was both urgent and substantial. Even the District Court did not challenge as a general proposition the INS's right to obtain a warrant in aid of its considerable investigatory powers.

*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), supports this conclusion. In *Almeida-Sanchez*, the Supreme Court ruled upon the constitutionality of the Border Patrol's warrantless, random search of an automobile 25 air miles north of the Mexican border. The Court held that a search conducted pursuant to the INS's general power to question and detain suspected aliens requires a search warrant, except in exigent circumstances, and thus disapproved random, warrantless searches of automobiles not qualifying as border searches. The Court assumed that under some circumstances the INS might obtain a warrant to search in aid of its general powers to question and detain aliens, if the INS first made some showing of probable cause.

We, too, infer from the provisions of the Immigration and Nationality Act some predicate power to obtain search warrants in aid of the enforcement activities

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permanent checkpoint located on major highway away from Mexican border is appropriate exercise of legitimate INS powers consistent with fourth amendment].

[12] *E.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973) [border patrol's warrantless, random search of petitioner's automobile 25 miles from Mexican border unconstitutional as lacking probable cause]; United States v. Karathanos, 531 F.2d 26, 34-35 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976) [affidavit underlying search warrant insufficient to show probable cause to believe illegal aliens residing in the premises]; United States v. Rodriquez, 432 F.2d 834, 839 (2d Cir. 1976) [search of house, after legitimate arrest of illegal aliens, improper without search warrant].

specifically delineated in the statute, although the statute does not explicitly authorize such warrants. The power to obtain warrants "in aid of jurisdiction" is an indispensable law enforcement tool in the field of criminal justice. Rule 41, Fed. R. Crim. P.; *cf.* 28 U.S.C. § 1615 (Supp. III 1979) [All Writs Act]. The Supreme Court has held that, in the civil area, administrative agencies also may obtain warrants when such searches will aid in the performance of regulatory functions. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *See v. Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

The same holds true for the INS. Its primary statutory enforcement function is to seek out, question, and detain suspected illegal aliens. *See* 8 U.S.C. § 1357(a), quoted at text following note 4 *supra*. Although the statute does not provide by its terms for INS entry into dwellings or commercial premises, it is logical to suppose, as did the *Almeida-Sanchez* Court, that INS agents are not always restricted to questioning only those whom they see on the street or in public places.

We conclude that the INS's right to enter commercial premises, with a proper warrant, for the purpose of searching out a suspected violation of the immigration laws derives from its general statutory power to seek out and question suspected illegal aliens.[13] We rest upon the *Almeida-Sanchez* Court's assumption that this is a valid exercise of the INS's statutory mandate, naturally

[13] We express no opinion as to whether the INS could ever obtain an "area search warrant" allowing agents to enter buildings randomly to inspect for illegal aliens or otherwise justifying random searches. The Supreme Court declined to decide that question in Almeida-Sanchez v. United States, 413 U.S. at 270 n.3, noting that the Justices joining in the opinion were divided on the question. *See* Justice Powell's discussion of area warrants in his *Almeida-Sanchez* concurrence, 413 U.S. at 283-85 (Powell, J., concurring).

to be implied from the serious nature of the INS enforcement effort and the statutory language.

2. Probable Cause to Search

The harder question is the showing of probable cause necessary to support an INS warrant to search for a suspected violation. The District Court held that the warrant in this case was invalid because it did not attain the level of "particularized description" necessary to justify a criminal search. It especially deplored the lack of detailed description of each individual alien, and the magistrate's failure to balance, on the face of the warrant, the public interest in law enforcement against Blackie's interest in privacy. The Government asserts in opposition that an INS search warrant need not and, moreover, *cannot* meet such a standard of probable cause, given the nature of the particular law enforcement activity. We agree that the District Court's stringent formulation of probable cause was inappropriate in the present situation, and that *Marshall v. Barlow's, Inc.*, 436 U.S. at 320, calls for a more flexible definition of probable cause to comport with the multiplicity of "hybrid" administrative law enforcement activities in a non-criminal context.

The reasoning of the *Marshall* Court is central to our decision. In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Supreme Court held unconstitutional a statute which allowed OSHA officials to conduct a *warrantless* search of the work area of any facility within the agency's jurisdiction. 29 U.S.C. § 657 (Supp. III 1979). Although the statute required the OSHA inspector first to show his credentials, he was not required to obtain a warrant prior to entry, Congress having believed that the value of surprise in a routine inspection outweighed any privacy interests of the employer. *Marshall v. Barlow's, Inc.*, 436 U.S. at 316.

The Supreme Court concluded that, even though Congress had apparently given its express consent to a warrantles search in that instance, such a search would nevertheless violate the fourth amendment. The Court established a principle which holds in this case, namely, that an intrusion upon commercial premises, even if motivated by a valid regulatory purpose, is unconstitutional absent a proper warrant or exigent circumstances. The Court rejected the contention that a party's privacy is of minimal importance when balanced against the state's need to enforce its regulatory laws. Rather, "the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." [14]

The second portion of *Marshall* is of primary importance to the resolution of this case. Having determined that the warrantless search provision of OSHA was unconstitutional, the Court then discussed the type of warrant sufficient to support a routine inspection conducted by OSHA in fulfillment of its regulatory responsibilities. To the argument that OSHA could only obtain a warrant on a showing that illegal working conditions existed on those very premises, the Court replied unequivocally:

> *Probable cause in the criminal law sense is not required.* For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'

*Marshall v. Barlow's, Inc.*, 436 U.S. at 320, *quoting Camara v. Municipal Court*, 387 U.S. at 538 (emphasis added).

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[14] *Id.* at 312-13. Heeding the lessons of *Marshall*, the INS agents in this case did not attempt to conduct a warrantless search of Blackie's but, rather, twice attempted to obtain a valid search warrant.

In so holding, the Court clarified the standards set forth in an earlier "administrative warrant" case, *Camara v. Municipal Court*, 387 U.S. 523 (1967). Since *Camara*, the law has been that "'[w]here considerations of health and safety are involved, the facts that would justify an inference of "probable cause" to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken.' *Camara v. Municipal Court*, 387 U.S. at 538, *quoting Frank v. Maryland*, 359 U.S. at 383 (Douglas, J., dissenting). The Court in *Camara* noted that the ultimate question, for purposes of compliance with the fourth amendment, is the "reasonableness" *vel non* of a particular warrant. 387 U.S. at 536-37.

In the context of routine agency inspections, such as those involved in *Marshall* and *Camara*, the reasonableness of a search warrant obviously cannot depend on evidence of the condition of the particular building sought to be searched. In those cases, the Supreme Court held that the probable cause requirement would be satisfied if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Camara v. Municipal Court*, 387 U.S. at 538. Such standards could be based upon "the passage of time, the nature of the building, or the condition of the entire area," *id.*, in the case of the *Camara* fire inspection warrant, or upon the nature of the business being conducted, in the case of the *Marshall* OSHA warrant. Both the *Camara* and *Marshall* Courts turned deaf ears to the plea that a flexible probable cause requirement impermissibly lessens the protections of the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. at 328 (Stevens, J., dissenting). Instead, both Courts agreed that "[t]he warrant procedure is designed to guarantee that a decision to search private

property is justified by a reasonable governmental interest. *But reasonableness is still the ultimate standard.*" *Camara v. Municipal Court*, 387 U.S. at 539 (emphasis added).

Since *Marshall*, the Court has reiterated its conviction that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* at 655 (citation omitted), *quoting Camara v. Municipal Court*, 387 U.S. at 532.

In the present case, the District Court did not directly address the question of whether a flexible standard of probable cause would justify the type of warrant obtained in this case, but simply assumed that a formulation of probable cause differed from the traditional requirement of "particularized description" is appropriate only in the context of routine inspections. Blackie's has set forth the argument in more detail. It contends that *Marshall* and *Camara* stood only for the proposition that routine inspections cannot be evaluated under stringent standards of probable cause, and not for the broader proposition that administrative warrants generally may be evaluated differently from criminal warrants.

We do not read *Marshall* so narrowly, however. Several courts since then have joined us in recognizing that not only routine inspections but agency enforcement activities in general are Protean, taking many forms which are not susceptible to treatment as traditional law en-

forcement activities.[15] Most notably, the Seventh Circuit recently held that criminal probable cause standards are inappropriately applied to OSHA search warrants issued in aid of searches for *specific violations* as well as for routine inspections. *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980). The court formulated the standard of probable cause broadly, remarking that "when a warrant is sought for an inspection to be conducted pursuant to a legislative or administrative plan, probable cause is to be judged according to the relaxed or flexible standard of administrative probable cause established in *Camara*." *Id.* at 1316-17. The court rejected the employer's interpretation of *Marshall*, which was that the "application of this standard is inappropriate where the warrant is sought on the basis of 'specific evidence of an existing location,'" *id.* at 1317. Instead, the court quoted *Marshall* for the proposition that probable cause in the context of administrative investigations may be established *either* by specific evidence of an existing violation *or* by a showing of a reasonable legislative or administrative plan. *Marshall v. Barlow's, Inc.*, 436 U.S. at 320. Thus, the *Burkart* court concluded, "the more logical interpretation of the Court's language is that criminal probable cause is not required for either an employee complaint or administrative plan inspection." *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1317 n.4.

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[15] *See, e.g.*, Marshall v. W & W Steel Co., 604 F.2d 1322, 1326 (10th Cir. 1979); Weyerhauser Co. v. Marshall, 592 F.2d 373, 377 (7th Cir. 1979); In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); In Re Carlson, 580 F.2d 1365, 1377, 1381 (10th Cir. 1978); United States v. Consolidated Coal Co., 560 F.2d 214, 218 (6th Cir. 1977), *reinstated after remand*, 579 F.2d 1011, 1012 (6th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

We find Judge Sprecher's excellent opinion in *Burkart* highly persuasive and adopt this reasoning fully, for we think that the search undertaken in this case was as unsuited to the application of traditional probable cause standards as were the routine inspections at issue in *Marshall* or the searches for specific violations involved in *Burkart*. It is difficult to imagine any instance in which INS agents could satisfy the District Court's requirement and obtain the names of each illegal alien employed in the nonpublic areas of a restaurant, or even physical descriptions any more particularized than those proffered to the magistrate in this instance. Since an illegal alien is essentially a fugitive outside the law, it is unlikely that his vital statistics will be on file anywhere in the United States or even that he will customarily use his real name, either in his contacts with the Government or with anyone else. Obviously he would never subject himself to more than the minimum of public scrutiny.

Furthermore, and most important to our way of thinking, is the fact that the stringent requirements laid down by the District Court would, in practical terms, have little effect on the activities of the law enforcement officers operating pursuant to the "stringent" warrant. If the INS agents in this case had entered Blackie's with a more "particularized" warrant, perhaps one setting out the first names of certain aliens, the agents would still have been forced to pursue exactly the same course of conduct as was pursued here: the questioning of those employees appearing to be aliens and found in nonpublic areas of the restaurant. The INS could perhaps never have obtained in advance information specific enough to allow it to pick a dozen suspected illegal aliens out of a large crowd of employees without the need for further questioning. Thus, it is unlikely that the INS could meet the standard of probable cause applicable in criminal cases, at least as formulated by the District Court, except in the rare in-

stance when an INS informer tips as to one specific violator and supplies the description and name of that person. The effect of the court's rule, then, is highly ironic; it leaves the INS free to combat isolated instances of illegal immigration and powerless to combat the much more serious problem of illegal alien employee congregations at one central place, such as a restaurant.

In short, we are not persuaded that *Marshall, Camara* or *Delaware* require the INS to meet a standard of probable cause so unrealistically restrictive as to cripple the statutory mandate to enforce the Act,[16] and we think the District Court erred in holding to the contrary. This

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[16] Michigan v. Tyler, 436 U.S. 499 (1978), is not to the contrary. *Michigan* addressed the question of whether fire inspectors, having extinguished a fire in a building, may at some later date enter the premises to search for evidence of arson on the authority of a warrant that does not satisfy criminal probable cause standards. The court held that

> an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. . . . Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.

436 U.S. at 511-12 (citations omitted). As the Seventh Circuit noted in *Burkart*, under *Michigan v. Tyler* "[c]riminal probable cause is required only when the investigation changes from purely administrative to criminal in nature." Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d at 1318. As in *Burkart*, the search in the present case was conducted pursuant to the INS's statutory mandate which, as the Supreme Court has noted, is civil in nature. Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

is one of "those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' " at least as to the persons sought. *Delaware v. Prouse*, 440 U.S. at 654. Rather, the court should have examined the warrant and supporting affidavits with an eye to whether the warrant satisfied the alternative requirement of *Delaware v. Prouse*: sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials. *Id.*

3. Sufficiency of the Warrant

With the correct probable cause standard firmly in mind, we are forced to conclude that the District Court erred in striking down the warrant in *Blackie's II*. This warrant was as descriptive as was reasonably possible with respect to the persons sought, the place to be searched, and the time within which the search might take place. In our view, the warrant contained sufficient safeguards to assure that nothing impermissible would be left to the discretion of the INS agents. *Delaware v. Prouse*, 440 U.S. at 654.

The warrant was duly restricted to the location in which there was cause to believe aliens could be found: "the premises located at 22nd and M Streets, North West, Washington, D.C." (App. at 40). It was also restricted as to the time within which the warrant could be executed, providing that execution must occur within 10 days of the order and during the daylight hours.

Furthermore, the INS was restricted as to how it could act once inside the premises. A search could only be conducted where aliens were likely to be hiding. Thus, the INS was proscribed from searching the files or books of Blackie's, and it is uncontroverted that they searched only those areas in which aliens were likely to be found. No private property of Blackie's within the premises was searched or seized.

Nor did the warrant leave impermissible discretion in the hands of the INS agents with respect to the persons sought to be questioned. The affidavits filed along with the application for search warrant suggested that numerous persons working in nonpublic areas of the restaurant were possibly illegal aliens, and gave credible reasons for the affiants' suspicions as well. *See* Affidavit of Immigration and Naturalization Service Officer Russell G. Parry, Jr., app. at 42 [describing evidence as to Ulysses Auger's suspected employment of illegal aliens, including a few first names of suspects and descriptions of suspected illegal aliens based on affiant's surveillance of restaurant]; Affidavit of Anonymous Informant, app. at 45 [describing knowledge of employment of illegal aliens at Blackie's, describing such suspects' personal appearances and naming several suspects]. These affidavits also contained very general, but not irrelevant descriptions of the suspects: persons dressed in foreign-style apparel, who appeared to speak no English.

Taken in conjunction with the warrant, which authorized the INS to enter the premises and make a search "including, but not limited to, the search of any locked rooms on the premises in order to locate aliens in the United States without legal authority," these papers establish that the INS agents were empowered to enter Blackie's only for the purpose of questioning those employees whom the agents might reasonably suspect of being illegal aliens, on the basis of the information in the warrant and the standards set down for the questioning of suspected aliens in *Yam Sang Kwai v. INS*, 411 F.2d 687. As we noted above, some amount of questioning is always necessary in such a situation, as this court recognized when it held in *Yam Sang Kwai* that INS agents may *question* a person merely upon the *articulable suspicion* that the person is an alien. *Id.* This warrant and accompanying affidavits narrowed down the field of potentially vulnerable persons to those employees whom

INS agents might reasonably believe to be aliens. We think this was precisely within the contemplation of the Act, and "reasonable" within the meaning of the fourth amendment.[17]

Our view as to the propriety of this warrant is also influenced by the significant amount of supporting evidence that accompanied the application for warrant. These included one affidavit summarizing two separate day-long surveillances of Blackie's, and a lengthy affidavit from an anonymous informant who claimed to have worked at Blackie's. The informant identified suspects by first names, described the layout of Blackie's Restaurant, and gave other indicia as to his credibility. The officers' surveillance of Blackie's corroborated the information set forth in the anonymous affiant's statement to the effect that Blackie's employed numerous persons of foreign appearance who were unable to speak English.

On the basis of these three indepenednt sources of information, it could be reasonably supposed that persons likely to be illegal aliens were being employed in Blackie's.

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[17] Blackie's has argued that reversal of *Blackie's II* would amount to a ruling that INS agents may obtain a warrant merely upon showing that persons inside the building have "foreign appearances." This misconceives our holding. The supporting affidavits included evidence that Blackie's was employing persons of foreign appearance, but this was certainly not the *only* evidence that Blackie's was employing illegal aliens. In addition, there was a lengthy affidavit from a person claiming to have worked at Blackie's. He claimed to know several of the suspected illegal aliens personally, described their appearances, supplied a few first names of suspects, and gave numerous other indicia as to his reliability.

Furthermore, even the two INS agents did not base their conclusions solely on the "foreign appearance" of suspects, but also marked the suspects' foreign style clothes, inability to speak English, and unwillingness to venture far from the restaurant. All this evidence *taken together* constituted probable cause to search.

The magistrate was therefore correct in assuming that the public interest in conducting a search justified the intrusion into Blackie's Restaurant. In the event, that intrusion occurred at 11:12 A.M.; 23 minutes in all were spent by the agents inside the restaurant, and at a time when, as might be expected, the number of patrons was small.

We are also unpersuaded by the District Court's argument that the magistrate erred in failing to indicate, on the face of the warrant, that he had balanced the privacy interests of Blackie's against the public's interest in law enforcement.[18] We feel, first of all, that such a balance is revealed in the magistrate's restriction of the period of search to a 10-day period, and to "the daylight hours," a time when the suspects would be present but, presumably, fewer customers would be disturbed, as proved in fact to be the case.

Furthermore, we are aware of no requirement that a magistrate recite some particular litany of "balancing" on the face of the warrant. Rather, the rule is that the balancing of the public against private interests is a matter which can be inferred from the particular provisions of the warrant as a whole, and which goes into the calculus of "reasonableness" *vel non*.

In our view, this warrant on the whole was reasonable, and reflects a balancing of public and private interests adequate for the purposes of the fourth amendment. What this warrant lacked in specificity as to the persons sought was counterbalanced by its specificity as to the places to be searched, the time and scope of the search,

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[18] The court's concern was apparently based upon the belief that the search as executed constituted a peculiarly severe invasion of Blackie's privacy. We do not agree, noting that, as indicated above, the search was conducted in less than half an hour before the lunchtime rush, and in a manner appropriate to the nature of the search.

and its strong supporting affidavits. We therefore reverse *Blackie's II*.

B. *Blackie's I*

We turn briefly to *Blackie's I*, in which the District Court struck down an INS search warrant that the magistrate had issued under Rule 41, Fed. R. Crim. P. The District Court held the warrant invalid for two reasons. First, the court found that the warrant in terms authorized the INS to search for and seize only property, not persons. It observed that the bottom portion of the warrant, which contained the final order to search, authorized the INS search for "the person or place named for the property specified . . . and if the property be found there to seize it . . ." *Blackie's I*, App. at 18. This being the case, it viewed the INS search as, at the least, having exceeded the scope of the warrant.[19]

Furthermore, the court held that Rule 41, Fed. R. Crim. P., did not authorize the INS's entry upon the commercial premises of a third person to search for illegal aliens. Rule 41, it said, "applies exclusively to searches for 'property.'" *Blackie's I*, App. at 20. It rejected the Government's suggestion that, for purposes of an INS search, illegal aliens are analogous to "tangible objects" such as drugs, illegal by their very status. *Id.* at 21.

Our consideration of this appeal is in large part concluded by the result we reach in *Blackie's II*. In *Blackie's II*, we have held that the INS may obtain a search warrant as an adjunct to its general statutory mandate to question and detain aliens believed to be in this country illegally. This conclusion, and our subsequent finding that the warrant satisfied the fourth amendment, were premised on the notion that INS investigations are essen-

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[19] *See* note 3 *supra*.

tially civil law enforcement activities, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and therefore may appropriately be evaluated under the standard of probable cause set out in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), and *Delaware v. Prouse*, 440 U.S. at 654.

Under this rationale, the warrant in *Blackie's I* was improperly premised on Rule 41, which authorizes magistrates to issue warrants in aid of *criminal* investigations. We need not reach the question of whether Rule 41 allows the issuance of warrants to search for persons as well as for property, nor need we review the District Court's construction of the search warrant.

## III

In conclusion, we hold that the warrant in *Blackie's II* was within the statutory authority of the INS to seek, and was, on the showing of probable cause made to the magistrate, sufficient, under the standards set out by the Supreme Court in *Marshall* and *Delaware*, to protect the fourth amendment rights of Blackie's and the enforcement interests of the United States. We think that the warrant curbed the discretion of the INS agents sufficiently to guard against the exercise of unbridled discretion on the part of the INS. The District Court's fundamental error lay in requiring that the INS meet the same level of probable cause as is appropriate in the case of criminal warrants. For these reasons, we affirm *Blackie's I* and reverse *Blackie's II*.

*It is so ordered.*

## APPENDIX B

**United States Court of Appeals**
For the District of Columbia Circuit

No. 79-1057
September Term, 1980

Blackie's House of Beef, Inc.

v.

Leonel J. Castillo, Commission of the Immigration and Naturalization Service, et al.,
*Appellants*

79-2358
Blackie's House of Beef, Inc.

v.

Leonel J. Castillo, Commissioner of the Immigration & Naturalization Service, et al.,
*Appellants*

CIVIL ACTION NOS.
79-0787 and 79-2338

United States Court of Appeals
For the District of Columbia Circuit

FILED July 22 1981

GEORGE A. FISHER
Clerk

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: McGOWAN, EDWARDS and GINSBURG, Circuit Judges

JUDGMENT

These consolidated causes came on to be heard on the records on appeal from the United States District Court

for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in No. 79-1057 is hereby affirmed, but for reasons which differ from those stated by the District Court, and the judgment of the District Court in No. 79-2358 is hereby reversed, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: July 22, 1981
Opinion for the Court filed by Circuit Judge McGowan.

## APPENDIX C

**United States Court of Appeals**
For the District of Columbia Circuit

No. 79-1057
September Term, 1980

Blackie's House of Beef, Inc.

Civil Action
No. 78-0787

v.

Leonel J. Castillo,
Commissioner of Immigration
and Naturalization Service, et al.,

FILED August 21, 1981

ARGUED 3-5-81

GEORGE A. FISHER
Clerk

Before: McGOWAN, EDWARDS and GINSBURG,
Circuit Judges

### ORDER

On consideration of appellee's petition for rehearing, filed August 5, 1981, and of the alternative request for remand to the District Court contained therein, it is

ORDERED by the Court that the petition for rehearing and the request for remand are denied.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

## APPENDIX D

**BLACKIE'S HOUSE OF BEEF, INC.,**
**Plaintiff,**

**v.**

**Leonel J. Castillo et al.,**
**Defendants.**
**Civ. A. No. 79-2338.**

United States District Court,
District of Columbia.

Oct. 3, 1979.

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Jack Wasserman, Washington, D.C., for plaintiff.

Dennis A. Dutterer, Asst. U. S. Atty., Washington, D.C., for defendants.

### MEMORANDUM

### I. Facts

OBERDORFER, District Judge.

This is an action by Blackie's House of Beef, Inc., ("Blackie's") against officials of the Immigration and Naturalization Service ("INS") on account of INS' use, on November 17, 1978, of a magistrate's order or warrant to search Blackie's restaurant and cocktail lounge on 22nd and M Streets, N.W., in Washington, D.C., and to locate, question and remove from there fourteen Blackie's employees, alleged to be deportable aliens. one month earlier, this Court had declared illegal another INS search for deportable aliens at Blackie's, because the warrant invoked by INS had authorized only the search for and

seizure of property under Federal Criminal Rule 41. *Blackie's House of Beef, Inc. v. Castillo,* 467 F.Supp. 170 (D.D.C. 1978). On two other previous occasions, INS entered plaintiff's premises without any warrant and seized persons there for deportation. These four searches have resulted in the seizure and forcible removal from plaintiff's premises of 61 persons subsequently subjected to deportation proceedings.

While declaring the earlier search and warrant illegal, the Court concluded on October 13, 1978 that:

> There being no imminent threat of further action pursuant to similar warrants by defendants against plaintiffs . . . the Court determines that plaintiff's prayer for equitable relief is premature but viable.[1]

In apparent recognition of these conditions for denial of equitable relief and the narrow grounds for the declaration that the earlier warrant was defective, on November 15, 1978, INS filed *ex parte* an application for a court order in C.A. 78-787, authorizing another entry into plaintiff's 22nd and M Street restaurant for the stated "purpose of making such search as is necessary. . . in order to locate aliens in the United States without legal authority and take such actions as authorized by the Immigration and Nationality Act."[2]

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[1]Plaintiff abandoned its claim for damages allegedly caused by the earlier search and related activities.

[2]The November 15 application was filed under the caption of No. 78-787 and referred to this Court as a related matter under Local Rule 37. Determining that the case was not related within the meaning of the Local Rule because that case was terminated, and having concern about the need either to proceed *ex parte* with the pending application or impair the INS' ability to search by surprise, this Court returned the application to the Clerk for random reassignment. By this process it reached Judge Aubrey Robinson.

The November 15 application invoked the Court's general jurisdiction created by the Immigration and Nationality Act, made no reference to Federal Criminal Rule 41 and did not seek authority to search for tangible articles or evidence; it requested authority to search the restaurant for deportable aliens and asserted probable cause for a belief that a search would disclose their presence there. Treating the November 15 application as seeking a warrant, Judge Aubrey Robinson referred it to a U.S. Magistrate.

On November 16, 1978, the magistrate entered an "Order for Entry on Premises to Search for Aliens in the United States Without Legal Authority," a copy of which is attached hereto as Appendix A (and hereinafter referred to as a "warrant"). The warrant recited the filing of the application supported by two affidavits, and the magistrate's finding

> on the basis of the affidavits that there is probable cause to believe that there are persons who are aliens in the United States without legal authority and subject to expulsion proceedings . . . located on or within the premises described.

On the strength of the finding of probable cause and invoking the Supreme Court's decision in *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) and sections 103(a), 279 and 287 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1329, 1357, the magistrate's Order of November 16, 1978 authorized defendants:

> to enter the premises described during daylight hours and to make such search as is necessary. . . to locate aliens in the United States without legal authority. . . .

The supporting affidavits related the first names of six allegedly deportable Spanish-speaking aliens likely to be present at plaintiff's restaurant during the period in which INS requested the right to search. The affidavits variously reported that plaintiff employed 8, 11, 16, 19 and 30 deportable Spanish-speaking aliens "believed to be of Hispanic descent, some of whom were dressed in a manner believed by the affiant to characterize such persons."

According to the affidavit, one group of 19

> had foreign personal characteristics and attire that are native to Hispanics from Central and South America, including dark complexion and hair, foreign-style haircuts and grooming, ill-fitted and inexpensive clothing and foreign-style, inexpensive shoes. They were heard to speak nothing but Spanish.[3]

The warrant itself, however, bore no names, first or otherwise, nor any other identifying description of any alien for whom the search was authorized. It gave the persons executing the warrant or those subject to it no direction as to whether the objects of the search of the restaurant were employees, patrons, or passers-by. The warrant did not state nor indicate the number of allegedly deportable aliens involved.[4]

The warrant limited the search to daylight hours, thereby excluding the evening, cocktail and dinner period. It made no reference, however, to the nature of plaintiff's business or the interests of employees and patrons who might be present in the restaurant innocently and legitimately at the

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[3]Affidavit of Russell G. Parry, Jr., filed Nov. 15, 1978, at 4.

[4]Of course, the plural reference was obviously to more than one.

time of a daylight search and any follow-up on it. There was no recital on the face of the warrant that the magistrate or anyone else had given any thought to or made any judgment about the interests of persons present at the time of the search who were not targets of it.

At 11:12 a.m., November 17, 1978, approximately ten INS officers executed the warrant. Six officers entered the premises at that time; four remained outside and did not enter until the search was nearly complete. In the ensuing 23 minutes the officers located, interrogated, detained, hand-cuffed and removed from the restaurant 14 allegedly deportable aliens.[5] All of the persons so questioned and detained were in the kitchen and utility areas of the restaurant. After removing the 14 from the restaurant, the officers detained them for an additional ten minutes in an alley behind the restaurant while readying them for transportation to the local INS office.

In addition, the officers observed on the premises four other persons whom they believed might be deportable aliens. The officers questioned, and decided not to detain, two of the four. Two others so observed eluded questioning and detention.

The officers originally entering the restaurant observed ten patrons there, as well as other employees. The officers observed four other patrons enter the restaurant while the search was in progress. During the search one officer questioned, but did not detain, one person who appeared to be attempting to leave the public area of the restaurant. At about 11:45 a.m., the search and removal ended and the

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[5]Those removed were transported from outside the restaurant to an INS office where deportation proceedings were commenced. Two were also prosecuted for violation of the Immigration and Nationality Act.

INS officers, left the vicinity of plaintiff's restaurant with their subjects in custody.

Reporters and photographers were present at the time of the search; news stories and photographs were printed prominently in the local press on the day following the search.

As required by the warrant, on November 20, 1978, INS officers filed with the magistrate a "Return On Order Permitting Search of Premises" ("Return"). The return advised that the entry and search had been conducted on November 17; it recited the names and country of origin of fourteen aliens "in the United States without legal authority [who] were found in the premises."

## II. Summary

### A.

The complaint invokes this Court's jurisdiction under 28 U.S.C. § 1331 to attack the legality of the November 17, 1978, search. The controversy is now before this Court on defendants' renewed motion to dismiss[6] and on cross-motions for summary judgment, each supported by statements of material facts, a stipulation of facts and factual admissions in the legal memoranda which have also been filed.

### B.

[1, 2] The Court has concluded on the facts here that the search conducted by the INS violated the plaintiff's fourth amendment rights. The warrant failed to indentify with sufficient particularity the allegedly deportable persons

[6]Defendants' original motions to dismiss denied on April 6, 1979.

from whom the INS had authority to search, thereby authorizing an overbroad search of plaintiff's premises, and failed to reflect consideration by the magistrate of the effect of the search, interrogation and seizure upon the plaintiff's business and upon the convenience and safety of plaintiff's patrons and innocent employees. The deficiencies of the warrant could not be cured by the authority of the INS to arrest without a warrant, 8 U.S.C. § 1357(a), or by application of the "plain view" doctrine after the INS legitimately gained access to plaintiff's premises, since the defendant knew when it applied for the warrant that it intended to search for persons not identified in the warrant and seize all persons whom the defendant thought to be illegal aliens.

C.

The claims for damages against the individual defendants can be resolved on their motions to dismiss. The Supreme Court pronouncements relied on here did not so "clearly establish" any duty with respect to the completeness and particularity of warrants that defendants' actions could fairly be attributable to malice or bad faith. By applying to this Court for an order they made a best effort to avoid actions inconsistent with this Court's earlier one. They applied for and relied in good faith on the magistrate's order or warrant authorizing the entry and search and on legal advice as to their statutory authority to act as they did once they gained entry. All of these considerations immunize the individual defendants from any damage claim by plaintiff here. *See Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Halperin v. Kissinger* (1979), 196 U.S.App.D.C. 285, 606 F.2d 1192.

## III. Discussion

### A.

The plaintiff challenges at the threshold the jurisdiction of the magistrate to issue the warrant here. But the magistrate signed this warrant on reference from Judge Robinson. The jurisdiction of a District Judge to authorize an INS entry and search for deportable aliens is based on 8 U.S.C. § 1329. That section provides that:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions [of the Immigration and Nationality Act].

The District Court's authority to authorize such an entry and search is reinforced by the All Writs Statute, 28 U.S.C. § 1651, authorizing a District Court to issue any writ:

> necessary and appropriate in aid of [its jurisdiction] and agreeable to the usages and principles of law.

A court's jurisdiction with respect to search orders sought by INS is confirmed by *Almeida-Sanchez v. United States,* 413 U.S. 266, 283-85, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (Powell, J., concurring).

In this case, instead of acting on the INS application personally, Judge Robinson referred it to a U.S. Magistrate. Our Local Rules contemplate issuance of search warrants by a magistrate. Rule 3-8(3), D.D.C.R. In this District, magistrates routinely issue most warrants. Judge Robinson's reference of this warrant to a magistrate was thoroughly appropriate (if not necessary) in aid of

Judge Robinson's jurisdiction, as well as "agreeable to the usages and principles of law," particularly the usages in this jurisdiction. 28 U.S.C. § 1651. In addition, 28 U.S.C. § 636(b) conferred upon Judge Robinson authority to "designate a magistrate to hear and determine any pretrial matter pending before the court" and to assign to a magistrate "such additional duties as are not inconsistent with the Constitution and the laws of the United States." When Judge Robinson exercised that authority by referring to a magistrate the INS application to search Blackie's, the Judge conferred upon the magistrate any jurisdiction he might otherwise lack for action on the INS application.

B.

On the merits, the heart of plaintiff's claim is a challenge to the warrant itself as authority for the search which transpired. The principles controlling the validity of the warrant at issue here have been clearly stated by the Supreme Court in a number of recent decisions. While none confronts this situation directly, taken together, the cases underscore the central role of the magistrate and the warrant procedure in safeguarding the fourth amendment rights such as are at issue here.

[3, 4] The fourth amendment protects the interests of individuals in privacy and security by requiring that all searches be reasonable,[7] and, in the ordinary case, be perform-

[7] *See Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

ed pursuant to a properly issued warrant.[8] Mere reasonableness is no substitute for prior judicial approval of any search by a neutral and detached magistrate.[9] The requirement of a warrant reflects the "basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government," *United States v. United States District Court, supra,* 407 U.S. at 317, 92 S.Ct. at 2137, and concern that the necessity for any intrusion be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

[5] In order to ensure that the warrant procedure is not an empty gesture, the Constitution requires that the magistrate determine in advance that the proposed search is reasonable[10] and that the warrant, by its terms, "particularly describ[es] the place to be searched, and the person or things to be seized." U.S.Const.amend.IV; *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). Together, these restrictions guarantee that "searches deemed necessary [remain] as limited as possi-

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[8] *Arkansas v. Sanders,* ___ U.S. ___, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); *Mincey v. Arizona,* 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *United States v. Chadwick,* 433 U.S. 1, 9, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

[9] *Arkansas v. Sanders, supra; United States v. United States District Court,* 407 U.S. 297, 317, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire, supra,* 403 U.S. at 481, 91 S.Ct. 2022 (1971).

[10] *Arkansas v. Sanders, supra; Zurcher v. Stanford Daily,* 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

ble," *Coolidge v. New Hampshire, supra,* 403 U.S. at 467, 91 S.Ct. at 2038; and that "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *see also Delaware v. Prouse, supra; Marshall v. Barlow's, Inc., supra; Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

[6] Although the magistrate is not required to specify in a warrant "the precise manner in which [it is] to be executed," *Dalia v. United States,* 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979) the Constitution imposes upon the magistrate a heavy burden of confining a proposed search within the bounds of reasonableness. As Justice Powell explained in his concurring opinion in *Zurcher v. Stanford Daily:*

> [T]he magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant. . . . If the reasonableness and particularity requirements are thus applied, the dangers are likely to be minimal.

436 U.S. at 570, 98 S.Ct. at 1984. Only by zealously performing his function of conducting a "particularized inquiry" based on the circumstances of the search can the magistrate "perform the important function of preventing harassment by keeping that invasion to a minimum." *Michigan v. Tyler,* 436 U.S. 499, 507-08, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978).

[7] As the Supreme Court has repeatedly made plain, the magistrate must do more than review passively requests

for warrants. Rather, he is expected to employ the "ample tools at his disposal to confine warrants to search within reasonable limits." *Zurcher v. Stanford Daily,* 436 U.S. at 567, 98 S.Ct. at 1982; *see also Arkansas v. Sanders, supra; Michigan v. Tyler, supra,* 436 U.S. at 508, 98 S.Ct. 1942.

[8] Moreover, the warrant must itself reflect the magistrate's exercise of discretion and control in order to "provide assurances from a neutral officer that the inspection is reasonable under the Constitution," and to "advise the [subject] of the scope and objects of the search, beyond which limits the [search] is not expected to proceed." *Marshall v. Barlow's, Inc.,* 436 U.S. at 323, 98 S.Ct. at 1826.

[9] It is important to note that the protections of the fourth amendment are not confined to those suspected of criminal activity, but encompass any violation of a cognizable interest in security or privacy. *Zurcher v. Stanford Daily, supra; Camara v. Municipal Court, supra.* In rejecting the claim that *more* than probable cause and reasonableness were required for third-party searches, Justice White, writing for the majority in *Zurcher,* also rejected the contrary proposition that the fourth amendment was *less* protective of the interests of third-parties than of the actual targets of the investigation. *Zurcher v. Stanford Daily, supra,* 436 U.S. at 555-56, 98 S.Ct. 1970; *see also id.* at 570 n. 2, 98 S.Ct. 1970 (Powell, J., concurring).

[10] Thus, it is the magistrate's task to balance the intrusion on fourth amendment interests of the person searched against legitimate government interests, irrespective of whether the person is a target. *See Delaware v. Prouse, supra,* 99 S.Ct. at 1396. In striking this balance, the magistrate must consider a number of distinct, constitutionally protected interests of the person subject to a search, including: "the threat of disruption to the occu-

pant. . ." *Michigan v. Tyler, supra,* 436 U.S. at 507, 98 S.Ct. at 1949; his "position and interests," avoiding "harassment," *id.* at 507-08, 98 S.Ct. 1942, the "privacy and security of individuals," *Marshall v. Barlow's Inc., supra,* 436 U.S. at 312, 98 S.Ct. 1816; protection against "subjective intrusion – the generating of concern or even fright on the part of lawful travelers," *U.S. v. Martinez-Fuerte,* 428 U.S. 543, 558, 96 S.Ct. 3074, 3083, 49 L.Ed.2d 1116 (1976); "physical and psychological intrusion" and "unsettling show of authority" and fright or even annoyance, *Delaware v. Prouse, supra,* 99 S.Ct. at 1398. "[T]he probable degree of interference with the rights of innocent persons," *Almeida-Sanchez v. United States, supra,* 413 U.S. at 284, 93 S.Ct. at 2545, is also an important fourth amendment concern.

C.

The INS relies for authority for this most recent search of Blackie's entirely upon "specific evidence of an existing violation, *e.g.,* illegal aliens located in the building to be searched." Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss, April 2, 1979, at 2. There is no effort by the INS to invoke "broad administrative standards" as its authority. *Id.; see generally Marshall v. Barlow's Inc., supra,* 436 U.S. at 313-14,[11] 98 S.Ct. 1816.

[11]Nor does the INS purport to rely upon the "border search" exception, *see generally United States v. Brignoni-Ponce, supra,* or the doctrine of "area searches," which was not authoritatively considered by the majority in *United States v. Almeida-Sanchez, supra,* 413 U.S. at 270 n.3, 93 S.Ct. 2535. The INS also does not contend that it had sufficient authority – either by warrant or statute – to make arrest prior to entering Blackie's, so that the initial intrusion was legitimized by the doctrine of "hot pursuit," *see Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), or to execute an arrest warrant, *see Dorman v. United States,* 140 U.S.App.D.C. 313, 435 F.2d 385 (1970).

The INS proceeds on two theories: first, because there was probable cause to believe that deportable aliens were present at Blackie's, a search warrant to enter the premises was authorized. INS contends that having thus lawfully gained entry, it needed no further authority from the magistrate to pursue, hold, question and remove any person in Blackie's determined by the searching officers to be a deportable alien. According to INS, 8 U.S.C. § 1357(a) and the "plain view" doctrine[12] authorized the follow-up actions of its officers. Alternatively, INS claims that in the circumstances, the warrant itself authorized all of the actions taken by the officers inside Blackie's.

Both of these claims of authority miss the sense of plaintiff's protest. It is not limited to entry and search; nor does it contest the arrests *qua* arrests. INS created a commotion in Blackie's by entering with a squad-size force, interrogating suspects, seizing them, and removing them from a restaurant in which plaintiff and its employees were preparing to serve lunch to patrons. It is the combination of INS activities inside the restaurant and the consequent threat to the business conducted there for which plaintiff seeks the protection of the fourth amendment. This intrusion was not authorized by the plain language of the warrant. The warrant for a search could not lawfully be enlarged to justify the total intrusion either by the statute authorizing arrest without a warrant by INS officers or by the "plain view" doctrine as it has been authoritatively interpreted by the Supreme Court. Even if the warrant were treated as anticipating some arrests, it is completely lacking in the specificity required by the Constitution.

The first INS claim based on the statute and the "plain view" doctrine has superficial appeal. Section 287(a), 8

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[12]*See generally Coolidge v. New Hampshire, supra.*

U.S.C. § 1357(a), authorizes INS officers to interrogate without a warrant "any alien or any person believed to be an alien as to his right to be or to remain in the United States" and to

> arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of. . . [laws regulating admission, exclusion or expulsion of aliens] and is likely to escape before a warrant can be obtained for his arrest. . . .

8 U.S.C. § 1357(a).

[11, 12] But there is a negative pregnant in the statute relied upon by the INS: in making arrests far from the border, if there is an opportunity to obtain an arrest warrant, the INS must do so. The terms of the statute demonstrate that Congress did not purport to sanction warrantless arrests on *any* occasion. Further, it is well established that the requirements to arrest and to search are not the same, and authority for one is neither a necessary nor a sufficient predicate for the other. *Carroll v. United States,* 267 U.S. 132, 155-56, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Consequently, the INS may not rely on its statutory authority to arrest aliens found in Blackie's to justify a potentially violent "roundup" of aliens discovered in a general search of Blackie's.

Nor may the INS rely upon the "plain view" exception to the warrant requirement to justify an intrusion not authorized by the warrant. In *Coolidge v. New Hamsphire, supra,* 409 U.S. at 470-71, 91 S.Ct. 2022, the Supreme Court held that the doctrine of "plain view" will not justify a seizure of evidence discovered during a legitimate entry where the discovery was anticipated in ad-

vance of the search but not mentioned in the warrant. The Court stated:

> If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized."

*Id.* at 471, 91 S.Ct. at 2040. What applied to a search for "things" in *Coolidge* applies with equal force to a search for "persons" here.

As in *Coolidge,* the INS seizure here was a "step transaction" in which the ultimate seizure was the direct and intended result of the initial request to search. As the defendants concede, there could have been no entry without a warrant; without the entry, there would have been no opportunity to observe, interrogate, and seize fourteen employees. The warrant, however, provided for a search and no more.

In *Coolidge,* appellants challenge the validity of the seizure of evidence and its subsequent use in a criminal prosecution. The plaintiff here is not challenging the validity of the arrests made by the INS; rather, it contests the use of the "plain view" doctrine to justify a general search and "alien roundup" on its premises.

As the Court made clear in *Coolidge,* its limitation on the "plain view" doctrine is designed to protect the integrity of the warrant and particularity requirements of the fourth amendment. 409 U.S. at 469-71, 91 S.Ct. 2022. These requirements protect the interests of anyone subject to a fourth amendment intrusion, and not just the owner

of property seized or the person arrested.[13] Because the INS knew at the time it sought the warrant that it intended to search for and seize aliens whom it could not identify and for whom it lacked probable cause to arrest, thus significantly expanding the intrusion on plaintiff's fourth amendment interests, the INS cannot rely on the "plain view" doctrine to justify the broadened search.

The INS also contends that the warrant itself, without an assist from the "plain view" doctrine or statutory authority, authorized its November 17, 1978, actions at Blackie's. The warrant, however, fails to satisfy the requirements of the fourth amendment in two respects.

[13] First, the warrant fails to describe the place to be searched or the persons to be seized with sufficient particularity. U.S. Const. amend. IV. It does not contain any names or even physical descriptions of the allegedly deportable aliens; it does not enumerate the persons sought or indicate whether these persons were patrons or employees. The warrant simply confers blanket authority to "locate aliens in the United States without legal authority." In short, the warrant appears to grant the searching officers a "roving commission" to search the premises, limited only by their own subjective judgments about what persons in the United States without legal authority look like. Precisely this type of unlimited discretion was condemned

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[13]Although a provision of the Immigration and Nationality Act, 8 U.S.C. § 1324, makes it a crime to harbor aliens, Blackie's was charged with no offense. The statute provides specifically that employment "shall not be deemed to constitute harboring." 8 U.S.C. § 1324(a). The Court here takes no position on the appropriateness of a search for evidence of a crime involving the plaintiff; however, *Zurcher v. Stanford Daily, supra,* makes plain that the fourth amendment provides the same protections for suspects and innocent third-parties who are the targets of searches.

by the Supreme Court in *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Thus, this warrant failed to provide sufficiently objective guidelines for the searching officer. The warrant may fairly be analogized to those struck down by other courts that authorized searches for "obscene" materials,[14] "illegally reproduced" movies,[15] and "stolen" firearms.[16]

Second, and perhaps more important, the warrant fails to reflect adequate consideration by the magistrate of the

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[14] *Stanford v. Texas, supra; United States v. Marti*, 421 F.2d 1263 (2d Cir. 1970).

[15] *United States v. Drebin*, 557 F.2d 1316 (9th Cir., 1977), *mod. on reh. on other grds.*, 572 F.2d 215, *cert. denied*, 436 U.S. 904, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978).

[16] *United States v. Townsend*, 394 F.Supp. 736 (E.D.Mich.1975).

The affidavits accompanying the warrant do not cure the constitutional defect, even if they are taken as incorporated into the warrant itself, *see Moore v. United States*, 149 U.S.App.D.C. 150, 461 F.2d 1236 (1972). Rather, they confirm the conclusion that the officers were not properly limited. For example, the affidavit of Russell G. Parry, Jr., *see page 3, supra*, suggests that the objects of the INS search were persons with "foreign characteristics," and "foreign-style" haircuts, grooming and shoes. This is thus not a situation in which the absence of particularity is cured by context or affidavits. *See Andresen v. Maryland*, 427 U.S. 463, 479-82, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *In re Search Warrant dated July 4, 1977*, 187 U.S.App.D.C. 297, 572 F.2d 321, 326-28, *cert. denied sub nom., Founding Church of Scientology v. United States*, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978).

interests of the plaintiff in avoiding or minimizing the intrusiveness of a search and seizure on its premises. The Supreme Court's recent reiterations of the magistrate's responsibility in issuing warrants to consider the effects of the search upon the privacy, safety, and convenience of third persons such as the plaintiff who might be searched have already been elaborated.[17] The requirement of magistrate consideration of these protected interests will be unenforceable and meaningless unless the magistrate leaves some trace of his consideration on the face of the warrant. The failure of the Blackie's search warrant to reflect such consideration renders it fatally defective. *Cf. Jones v. United States,* 362 U.S. 257, 267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) (legality of search tested by sufficiency of magistrate's findings).

Without question, plaintiff had substantial fourth amendment interests at stake in the search of its business premises. Plaintiff has an obvious interest in protection of its income and its good will with its patrons. Beyond that, plaintiff has a legal duty to maintain a safe place of work for its employees and a safe environment for its invited patrons. A recent case in this circuit involving a scuffle between INS officers and an alien apprehended for deportation is warning enough that searches of a public restaurant by a squad of INS officers followed by the detention, questioning and removal of fourteen persons could be a violent event. *See Attoh v. INS,* 195 U.S.App. D.C. ____, 606 F.2d 1273 (1979). Patrons or nondeportable aliens frightened, harassed or injured by INS officers scuffling in a restaurant to remove a group of suspected aliens might well have damage claims against

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[17] *See Zurcher v. Stanford Daily, supra,* 436 U.S. at 555-57, 98 S.Ct. 1970; *Michigan v. Tyler, supra,* 436 U.S. at 507-08, 98 S.Ct. 1942; at 1085.

Blackie's, particularly if it acquiesced in the search and ancillary activities of the INS. Plaintiff has a constitutionally-protected right in its business and in the safety and convenience of its patrons and employees. This intrusion, unauthorized by warrant specifically identifying the persons to be seized, violated that right.

Thus, a warrant might appropriately authorize a search for and the arrest of a few persons when a warrant authorizing a search for and arrest of a larger number would only be appropriate at narrowly prescribed times in carefully described circumstances. This is not to say that the magistrate should have become embroiled in the details of the search and the movements of the officers thereafter. *See Dalia v. United States, supra,* 441 U.S. at 257, 99 S.Ct. 1682. But it would have been feasible for the warrant at least (1) to enumerate, state the available first names, and to describe, insofar as possible, the persons whom the INS had probable cause to believe to be deportable aliens; and (2) briefly to appraise on the face of the warrant the effect of the contemplated law enforcement activities upon non-governmental interests.

## IV. Conclusion

[14] 1. A warrant was required for the November 17, 1978 search of Blackie's by INS to locate, interrogate and apprehend deportable aliens there. *Blackie's v. Castillo,* 467 F.Supp. 170 (D.D.C.1978).

[15] 2. The magistrate had authority to issue a warrant for use by INS in connection with a November 17, 1978 search of Blackie's by virtue of INS's application for a court order and Judge Aubrey Robinson's reference of that application to the magistrate.

[16] 3. Plaintiff has standing to sue on account of INS' use of an allegedly defective warrant on November 17, 1978 because the entry, search, interrogation and removal of fourteen persons, particularly in light of three earlier entries without valid warrants, injured or threatened injury to plaintiff's fourth amendment rights to conduct its business free from such unlawful intrusions.

4. This Court has jurisdiction of such a suit against official defendants under 28 U.S.C. § 1331.

[17] 5. The individual defendants are immune from any claim for damages in the circumstances here because they applied in good faith for a warrant, relied in good faith on the November 16, 1978, warrant as authority to enter Blackie's and relied in good faith on responsible legal opinion that the interrogation and seizure of persons without a warrant were authorized by statute.

6. The warrant here was defective because, although the entry planned by INS was for the purpose of seizing persons, it failed to so state or to describe the persons to be seized with the "particularity" required by the fourth amendment.

7. The warrant was also defective because it failed to reflect adequate consideration by the magistrate of the relative importance of the INS enforcement interest to be served by the warrant compared to the interests of plaintiff, its patrons and its employees in protection against the intrusion, inconvenience and possible injury which could result from execution of the warrant.

8. The search as conducted by the INS was unconstitutionally broad. The INS could not rely on the "plain view" exception to the warrant requirement or its statutory authority to arrest without a warrant to expand its intru-

sion of plaintiff's premises beyond the scope of the warrant, because the discovery and arrest of aliens not identified in the warrant was not inadvertent, but was planned, intended, and known to the INS at the time it applied for the warrant.

[18] 9. Plaintiff is entitled to an injunction restraining the official defendants, their agents, successors and persons acting in concert with them from entering plaintiff's premises in the District of Columbia, (except in exigent circumstances)[18] for the purpose of searching for, interrogating or seizing persons there without authority of either (1) an order of a judge of this Court or (2) an order or warrant issued by a magistrate which complies with the warrant clause of the fourth amendment, including the requirements that the warrant particularly describe any persons to be seized, and reflect adequate consideration by the magistrate of the effect of execution of the warrant upon interests other than INS's interest in law enforcement. Such an Order accompanies this Memorandum Opinion.

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[18] *See generally Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408 (1978).

## APPENDIX A

### Exhibit A

In the United States District Court for the District of Columbia

In the Matter of
Blackie's House of Beef
and Deja Vu Cocktail Lounge
22 & M Streets Northwest
Washington, D.C.

### ORDER FOR ENTRY ON PREMISES TO SEARCH FOR ALIENS IN THE UNITED STATES WITHOUT LEGAL AUTHORITY

The United States, having filed an application requesting authorization for Russell G. Parry, Jr., an Immigration and Naturalization Service officer, and/or such other immigration officers as may be designated by the Immigration and Naturalization Service, to enter the premises located at 22nd and M Streets, North West, Washington, D.C., in order to search for persons believed to be aliens in the United States without legal authority, together with both affidavits in support of that application, and the Court finding, on the basis of the affidavits, that there is probable cause to believe that there are persons who are aliens in the United States without legal authority and subject to expulsion proceedings under section 242 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252, located on or within the premises described.

IT IS HEREBY ORDERED that based on the grounds set forth in the affidavits of Russell G. Parry, Jr. and pursuant to *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2535 (1973) and sections 103(a), 279 and 287 of

the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1329, and 1357

You, Russell G. Parry, Jr., an Immigration and Naturalization Service officer and/or other such immigration officers as the Immigration and Naturalization Service may designate are authorized to enter the premises described during the daylight hours and to make such search as is necessary including, but not limited to, the search of any locked rooms on the premises in order to locate aliens in the United States without legal authority and subject to expulsion proceedings pursuant to section 242 of the Immigration and Nationality Act of 1952. In making this search, however, the Immigration and Naturalization Service officer and/or such other immigration officers as the Immigration and Naturalization Service may designate are authorized to enter the premises during the daylight hours and within 10 days of this order. A return within 10 days shall be made to this Court when the search has been completed.

## APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| BLACKIE'S HOUSE OF BEEF, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 78-2338 |
| LEONEL J. CASTILLO, *et al.*, | ) | |
| | ) | FILED |
| | ) | OCT. 3, 1979 |
| Defendants. | ) | JAMES F. DAVEY, |
| | ) | CLERK |

### ORDER AND JUDGMENT

This matter came before this Court on defendants' motions to dismiss and on the parties' cross motions for summary judgment. For the reasons set forth in the accompanying memorandum, the plaintiff is entitled to declaratory and injunctive relief. Plaintiff is not entitled to relief in its suit for damages against the defendants in their individual capacities.

Accordingly, it is this 3d day of October, 1979, hereby

ORDERED, ADJUDGED AND DECREED: That a Declaratory Judgment is entered for plaintiff that the action of defendants in their official capacities was illegal and unreasonable; and it is

FURTHER ORDERED: That, except in exigent circumstances,* the defendants, their agents, successors, and

*See generally Mincey v. Arizona, 437 U.S. 385, 390 (1978).

persons acting in concert with them are ENJOINED from entering any of plaintiff's premises in the District of Columbia for the purpose of interrogating, searching for or seizing persons or things there without authority of either (1) an order of a judge of this Court; or (2) an order or warrant issued by a magistrate, which complies with the requirement of the fourth amendment, including the requirement that the warrant particularly describe the person or things to be searched or seized and that the magistrate who issued it considered the effect of the execution of the warrant on the interests of the plaintiff protected by the fourth amendment; and it is

FURTHER ORDERED: That plaintiff's actions against defendants in their individual capacities are DISMISSED with prejudice.

/s/

UNITED STATES DISTRICT JUDGE

## APPENDIX F

## UNITED STATES DEPARTMENT OF JUSTICE
## IMMIGRATION AND NATURALIZATION SERVICE

### RECORD OF SWORN STATEMENT
### IN AFFIDAVIT FORM

### MISC. 78-0344
### AFFIDAVIT-WITNESSED

IN RE: [Government Informant]. Nov. 15, 1978. EXECUTED AT Washington, D.C. James F. Davey, date 10-27-78.

Before the following officer of the U.S. Immigration and Naturalization Service: M. Riordan, in the english language. Interpreter not used.

I, [Government Informant], acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding illegal aliens working and hiding in Blackies House of Beef 22nd & M Sts. N.W. Washington, D.C. He has told me that my statement must be made freely and voluntarily. I am willing to make such a statement. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement: While Helping a friend move into 2005 Mass. Ave. N.W. Washington, D.C. I had the opportunity to talk to a Manuel and Jose who were complaining about working

conditions and small paychecks at their place of employment, Blackies House of Beef 22nd & M Sts. N.W. Wash., D.C.. During further conversation with these two individuals they told me in confidence that they were in the United States from El Salvador illegally without a passport, visa or social security number. They also stated that without a social security number Blackies pays less money per hour in wages. During a visit with a friend at 1704 16th N.W. Washington, D.C. I had the opportunity to talk to five other individuals Victor, Raul, Manuel, Andres, Dave, they knew I had a car and asked me if I would take them shopping, during the ride they had told me that they are employed at Blackies House of Beef, currently, and that they are illegal in the United States, without papers. All of our conversations were in spanish because none of these individuals speak English. All of these conversations were during the week of October 23, 1978. I personally know of sixteen illegal aliens that work at Blackies House of Beef now, and would bet there is as many as thirty illegals working there. I do not know any other names of the illegals because I have only had the opportunity to work with them and not to know them personally. In July 1978 I went to see some of my friends in Blackies and they were telling me about a room where he hides all the illegal aliens when Immigration comes. I believe this door is behind the dishwasher in the kitchen area, it is a big storage area and when alot of the illegal aliens go into it they pad lock it and tell Immigration that they do not have the key to this lock. I know one . . . . illegal alien who Blackie Auger sends to his house to clean and do yard work, his name is Manuel and I have personally taken him there to do the work on 3 different occasions. Blackies has a few different shifts which are 7:00 a.m. to 3:00 p.m., split shift 10:00 a.m. to 3:00 p.m., 5:00 p.m. to 2:00 a.m., split shift 6:00 p.m. to 11:00 p.m. I feel

very sorry about the illegal aliens, however I am a restaurant person myself and I hate to see Blackie using these people for his own benefit and cheating them on their wages.

Subscribed and sworn to at 1129 New Hampshire Ave. N.W. Apt. 406 Washington, D.C. on the 27th 1978.

Witnessed Mark P. Riordam /s/ Government Informant.

## APPENDIX G

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | MISC. |
| BLACKIE'S HOUSE OF BEEF | ) | No. 78-0344 |
| AND DEJA VU COCKTAIL LOUNGE | ) | |

FILED
NOV. 15, 1978
James F. Davey, Clerk

### AFFIDAVIT OF IMMIGRATION AND NATURALIZATION SERVICE OFFICE

| | | |
|---|---|---|
| CITY OF WASHINGTON | ) | ss: |
| STATE OF DISTRICT OF COLUMBIA | ) | |

Russell G. Parry, Jr., being duly sworn, deposes and says that he is a Supervisory Criminal Investigator of the Immigration and Naturalization Service, Department of Justice, with 8 years' experience, duly appointed according to law and acting as such.

Upon information and belief, there are a number of aliens who are not lawfully entitled to reside within the United States, employed at and present within the premises known and operated as Blackie's House of Beef and Deja Vu, a restaurant and cocktail lounge (hereafter known as "Blackie's"), located on the northeast corner of 22nd and M Streets, Northwest, Washington, D.C., within the District of Columbia.

The source of your deponent's information and the grounds for his belief are:

1. On October 10, 1978 a sworn statement, a copy of which is attached hereto, was given to the Immigration and Naturalization Service that states that at least 16 and

perhaps as many as 30 illegal aliens work at Blackie's. The sworn statement was given by a reliable informant who is a United States citizen and who has provided information to the INS on numerous occasions during the past 3 years concerning illegal aliens. Each time the information has proven to be accurate. He has personal knowledge that illegal aliens are so employed. His information is based on his friendship with aliens employed at Blackie's who have admitted having no documents entitling them to enter or remain in the United States.

The statement shows that the first names of six of the illegal aliens are: Manuel, Jose, Victor, Raul, Andres, and Dave.

The informant also stated that he was told by friends of his who work at Blackie's that there is a room located off the kitchen in Blackie's where illegal aliens hide when the INS is on the scene. According to the informant, the door from the kitchen to that room is padlocked before the INS agents enter the kitchen and that the agents are then told that no one on the premises has a key to the lock.

2. On October 23, 1978, your deponent personally entered Blackie's and observed 11 persons believed to be aliens employed at that location between the hours of 11:30 a.m. and 12:30 p.m.

3. On October 24, 1978, your deponent personally observed 8 persons believed to be aliens unloading delivery trucks between the hours of 10:00 a.m. and 11:00 a.m. in the delivery entrance at Blackie's.

4. The deponent's belief that the persons mentioned in paragraphs numbered 2 and 3 are aliens is based on the following: the 19 persons observed on the aforementioned dates at Blackie's all appeared to be of

Hispanic descent. In addition, three persons who were encountered washing outside windows at Blackie's on October 23, 1978 were asked if the restaurant were open for lunch. They all indicated that they could not understand English, motioned to the host inside the restaurant, and appeared nervous by avoiding eye contact. Further, all 19 persons had foreign personal characteristics and attire that are native to Hispanics from Central and South America, including dark complexion and hair, foreign-style haircuts and grooming, ill-fitting and inexpensive clothing, and foreign-style, inexpensive shoes. They were heard to speak nothing but Spanish.

5. Criminal Investigator Mark Riordon of the Immigration and Naturalization Service stated to the deponent that on October 27, 1978, between the hours of 9:00 a.m. and 10:00 a.m. he personally observed 13 persons believed to be aliens of Hispanic descent arriving to work at Blackie's. Investigator Riordon's observation was also based on personal characteristics and attire of the type described in paragraph 4.

6. Blackie's is a known employer of illegal aliens. This knowledge is based on the following facts. The records of the INS show that since January 30, 1974, 48 illegal aliens who were employed at that restaurant have been apprehended by the Service. In addition, a recent *Washington Post* newspaper article, a copy of which is attached hereto, stated that the manager of Blackie's said that he hires foreign workers because of their reliability and that he does not demand to see their green cards except in Virginia.

7. Your deponent states that on three occasions since June 1976, the latest being March 22, 1978, cooperation has been sought from the owner or manager of Blackie's by the Immigration and Naturalization Service to inter-

view aliens employed at the restaurant as to their right to be or to remain in the United States and that on all three occasions the owner or manager has refused to permit entry without judicial authorization. In addition, an article in the September 1978 issue of the *The Washingtonian*, a copy of which is attached hereto, quoted the owner of Blackie's as follows: "I told them [INS] to shove off – if they wanted in my business, they damned well could go get a warrant." Further, Criminal Investigator Salvador Molina of the Immigration and Naturalization Service stated to the deponent that he has been told by Ulysses Auger II, manager of Blackie's that the only way he will allow the Immigration and Naturalization into his restaurant is with a warrant.

Wherefore, your deponent requests that court process be issued to him and/or other such Immigration officers as he may designate authorizing him or them to enter Blackie's and there to interrogate individuals pursuant to Title 8, United States Code, Section 1357.

/s/

Russell G. Parry, Jr.

Sworn to before me this 14th day of November, 1978.

/s/

My Commission expires February 28, 1983

## APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| BLACKIE'S HOUSE OF BEEF, INC., | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Civil Action |
| | : | No. 78-2338 |
| LEONEL J. CASTILLO, *et al.*, | : | |
| | : | |
| Defendants. | : | |

### AFFIDAVIT

CITY OF WASHINGTON )
ss:
DISTRICT OF COLUMBIA )

MARY P. ELSTEIN, being duly sworn according to law, deposes and says:

1. I am private secretary to Ulysses Auger and I work on the second floor of the building known as Blackie's House of Beef, Inc., 22nd and M Streets, N.W., Washington, D.C.

2. The restaurant, the Deja Vu cocktail lounge, kitchen area and storage areas are located on the first floor. The restaurant area, lounge and storage areas on the first floor consist of 16 separate rooms. There are storage areas as well as a dining and cocktail area on the second floor. There is no area where aliens are hidden at any time.

3. On the second floor are private offices including my office and the office of Ulysses Auger.

4. I was present in my office on November 17, 1978 when Blackie's House of Beef, Inc. was the subject of a search by officials of the Immigration and Naturalization Service. At that time they entered every room including my private office and the private office of Ulysses Auger. No aliens worked in either of these private offices.

5. I have read the attached article which appeared in the Washington Post on November 18, 1978 and I affirm that it accurately describes the events including the arrest of 14 aliens which occurred on the occasion of the search.

/s/
MARY P. ELSTEIN

Sworn and subscribed to before me this 22nd day of February, 1979. My commission expires 19 November 1982

/s/
NOTARY PUBLIC

# Opposition

Office - Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-949

# In the Supreme Court of the United States

OCTOBER TERM, 1981

BLACKIE'S HOUSE OF BEEF, INC., PETITIONER

*v.*

ALAN C. NELSON, ACTING COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

JULIAN S. GREENSPUN
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service may obtain an administrative warrant to enter commercial premises for the purpose of locating and removing illegal aliens.

2. Whether the probable cause and particularization requirements of criminal arrest warrants are applicable to such administrative warrants.

3. Whether the affidavits underlying the warrant in this case meet the standards articulated by the court of appeals.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-949

BLACKIE'S HOUSE OF BEEF, INC., PETITIONER

*v.*

ALAN C. NELSON, ACTING COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 659 F. 2d 1211. The opinion of the district court (Pet. App. 40a-61a) is reported at 480 F. Supp. 1078.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on July 22, 1981. A petition for rehearing was denied on August 21, 1981 (Pet. App. 38a-39a). The petition for a writ of certiorari was filed on November 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Petitioner, Blackie's House of Beef, Inc. ("Blackie's"), operates a restaurant at 22nd and M Streets, N.W., Washington, D.C. In March 1978, Immigration and Naturalization Service (INS) agents, pursuant to a search warrant issued under Fed. R. Crim. P. 41, apprehended

ten illegal aliens at Blackie's (Pet. App. 5a-6a).[1] Blackie's then obtained a declaratory judgment from the United States District Court for the District of Columbia (*Blackie's I*), holding that the warrant was invalid because Fed. R. Crim. P. 41 authorizes searches for property but not persons (*ibid.*).

Following the district court's decision, the INS received information that Blackie's continued to employ more than 30 illegal aliens (Pet. App. 7a). Based upon information supplied by a reliable informant (*id.* at 7a, 56a-68a), which was corroborated by the personal observations of INS agents surveying Blackie's (*id.* at 7a, 69a-72a),[2] the INS applied for and obtained an order from a United States Magistrate authorizing INS agents to enter Blackie's to detain and question persons suspected of being present in the United States without legal authority (*id.* at 62a-63a). The magistrate's authority for the order was premised upon 8 U.S.C. 1103(a), 1329 and 1357 (Pet. App. 62a-63a). Pursuant to this warrant, the INS removed 14 illegal aliens from Blackie's following a 23-minute search on November 17, 1978 (*id.* at 8a-9a).

Blackie's again filed suit for injunctive and declaratory relief (*Blackie's II*). The district court held that the second warrant was invalid because it did not list the names and

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[1]The term "illegal alien" refers to a foreign national who enters or remains in the United States in violation of the Immigration and Nationality Act, 8 U.S.C. (& Supp. IV) 1101 *et seq.*

[2]The supporting affidavits and other materials presented to the magistrate explained that 48 illegal aliens employed by Blackie's had been apprehended by the INS since 1974; that INS agents had unsuccessfully sought permission from Ulysses "Blackie" Auger (the owner and operator of Blackie's) to interview aliens in his restaurant; and that Auger intended to continue hiring illegal aliens, as reflected in two interviews of Auger appearing in the *Washington Post* and the *Washingtonian* magazine (Pet. App. 7a-8a, 71a-72a).

physical descriptions of each illegal alien sought and did not balance INS enforcement interests against privacy interests that would be affected by a search. The district court also enjoined the INS from conducting future searches without a warrant that complied with these requirements (Pet. App. 9a, 64a-65a).

The court of appeals sustained, on different grounds, the district court's ruling in *Blackie's I*,[3] but it reversed the district court's ruling in *Blackie's II*. The court of appeals agreed with the district court that the magistrate was empowered to issue an administrative warrant authorizing INS agents to search for illegal aliens in commercial premises (Pet. App. 21a-22a).[4] Contrary to the district court, however, the court of appeals held that the level of probable cause necessary to support an administrative warrant is less than that necessary to support a criminal warrant (*id.* at 23a-26a). In addition, the court of appeals held that the district court erroneously applied the particularization requirements of criminal warrants to administrative search warrants (*ibid.*).

The court of appeals concluded that the affidavits presented to the magistrate in this case provided sufficient probable cause, in an administrative context, to believe that illegal aliens were located at Blackie's. The court of appeals also found that the warrant was sufficiently particularized and limited as to the persons sought, the place to be

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[3]Because the court of appeals held in *Blackie's II* that an administrative warrant was the appropriate process to utilize in searching commercial premises for illegal aliens, it concluded that "the warrant in *Blackie's I* was improperly premised on Rule 41, which authorizes magistrates to issue warrants in aid of *criminal* investigations" (Pet. App. 35a; emphasis in original).

[4]The district court held (Pet. App. 47a) that the magistrate had authority to issue the warrant pursuant to the All Writs Act, 28 U.S.C. 1651, as stated in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 283-285 (1973) (Powell, J., concurring).

searched, the time of the search, and the manner of conducting the search to withstand a challenge based on the theory that the warrant left the executing officers with unduly broad discretion (Pet. App. 30a-32a). Finally, the court of appeals held that the search warrant itself need not recite any particular "balancing" of enforcement and private interests (*id.* at 33a).[5]

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another federal court. The petition for a writ of certiorari therefore should be denied.

1. The propriety of using administrative search warrants to enter commercial premises in furtherance of civil law enforcement functions is well established. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *See* v. *Seattle*, 387 U.S. 541 (1967); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); see also *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981), slip op. 3-5. The propriety of using administrative warrants to locate and apprehend illegal aliens was recognized by Justice Powell in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 283-285 (1973) (Powell, J., concurring). Federal district courts possess authority to issue such warrants under the All Writs Act, 28 U.S.C. 1651(a), to aid the INS in fulfilling its express statutory duty under 8 U.S.C. 1357(a) to seek out, question, and detain suspected illegal aliens (Pet. App. 22a).

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[5]The court of appeals noted, however, that "such a balance is revealed in the magistrate's restriction of the period of search to a 10-day period, and to 'the daylight hours,' a time when the suspects would be present but, presumably, fewer customers would be disturbed, as proved in fact to be the case" (Pet. App. 33a).

Petitioner's argument (Pet. 8-9) that the authority of the INS to conduct searches is limited by the provisions of 8 U.S.C. 1357(a)(3) is erroneous. That statute provides the INS with authority to conduct *warrantless* searches near the border (Pet. App. 15a n.6), but does not restrict the authority of the INS to conduct lawfully authorized searches in areas removed from the proximity of the border. *Almeida-Sanchez* v. *United States*, *supra*, 413 U.S. at 272-275 (Powell, J., concurring). See also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-564 (1976).

Petitioner's further argument (Pet. 9) that district courts may not issue administrative warrants without express authority from Congress is insubstantial. In *Marshall* v. *Barlow's, Inc.*, *supra*, for example, the Court held that the Secretary of Labor must obtain administrative warrants under the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), even though the statute makes no express provision for such warrants. 436 U.S. at 309. Moreover, petitioner's contention ignores the All Writs Act, which empowers the courts of the United States to issue any process necessary to the enforcement of laws within their jurisdiction.[6] See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 173-174 (1977) (All Writs Act provides authority to order installation of a pen register); *In re Carlson*, 580 F. 2d 1365, 1373 (10th Cir. 1978) (All Writs Act provides authority for administrative warrant to search for assets subject to levy by Internal Revenue Service).

Petitioner's claim (Pet. 11) that it was incumbent upon the INS to promulgate a regulation providing for execution of a civil search warrant is supported only by the practice of

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[6]8 U.S.C. 1329 vests the district courts of the United States with jurisdiction over all cases, civil and criminal, arising under the immigration laws (*i.e.*, 8 U.S.C. 1151-1363).

the Occupational Safety and Health Administration, not by any constitutional authority. Indeed, this Court has noted that the OSHA regulation is not required by the Occupational Safety and Health Act of 1970. *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 317-319. In any event, this argument was not raised by petitioner in the court of appeals and is not properly presented for the first time in this Court.

2. Petitioner argues (Pet. 16) that the probable cause and particularization requirements of criminal search warrants are applicable to this case. Probable cause in the criminal law sense, however, is not required to support an administrative warrant.[7] Furthermore, requiring the INS to comply with the high levels of probable cause and particularization set by the district court would cripple enforcement of the nation's immigration laws (Pet. App. 28a-29a). Illegal aliens are fugitives whose very presence depends upon anonymity, and it is unlikely that information about their identity would be on file anywhere, or that they would use their real names in contacts with the government or anyone else (*id.* at 28a). Thus, a requirement that administrative warrants list with particularity the names and physical descriptions of all persons to be questioned by INS agents would often be impossible to satisfy. Moreover, an administrative

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[7]Administrative probable cause may be based not only on specific evidence of an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 320. Moreover, the fact that a warrant is based on information of a specific violation does not increase the degree of probable cause to that required for criminal warrants. *Ibid.*; *United States* v. *Consolidation Coal Co.*, 560 F. 2d 214, 220 (6th Cir. 1977), reinstated after remand, 579 F. 2d 1011, 1012 (1978), cert. denied, 439 U.S. 1069 (1979); *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F. 2d 1313, 1317 (7th Cir. 1980); *In re Carlson, supra*, 580 F. 2d at 1380-1381.

warrant merely permits INS agents to enter private premises to question persons who may be present in the United States illegally; it does not authorize seizures based simply on a name and physical description (*id.* at 28a-29a).

Petitioner contends (Pet. 12-13) that cases such as *Almeida-Sanchez* and *United States* v. *Ortiz*, 422 U.S. 891, 892, 896-897 (1975), reject the application of administrative search standards to searches for illegal aliens. In those cases, however, the Court refused to equate administrative inspection authority with a right to conduct *warrantless* searches. The Court did not hold that the INS may obtain a search warrant only upon supplying the names and physical descriptions of illegal aliens who may be apprehended. While the cases cited by petitioner refer to a requirement of probable cause, they do not suggest that this must be criminal, rather than administrative, probable cause.[8] See *Almeida-Sanchez* v. *United States, supra*, 413 U.S. at 279 (Powell, J., concurring).[9]

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[8]Petitioner's argument (Pet. 14-15) that criminal probable cause should be required because INS has dual civil and criminal enforcement authority is without merit. The fact that an agency with dual enforcement authority obtains information in an administrative search that may ripen into a criminal prosecution does not preclude the use of an administrative warrant or increase the level of probable cause needed to obtain it. *United States* v. *Consolidation Coal Co., supra*, 560 F. 2d at 220. See also *Michigan* v. *Tyler, supra*, 436 U.S. at 508, 511; *United States* v. *LaSalle National Bank*, 437 U.S. 298, 308-309 (1978). In any event, petitioner did not argue the dual enforcement issue before the court of appeals, and it has never suggested or offered evidence that the warrant in this case was merely a ruse to further a criminal prosecution. See; *id.* at 316-317.

[9]In the court below, petitioner unsuccessfully sought to distinguish Justice Powell's opinion in *Almeida-Sanchez*, arguing that the factors considered relevant in issuing an administrative warrant in that case, such as proximity to the border, precluded an administrative warrant in areas removed from the border. However, those were the factors that were appropriate "in the context of [that] case" (413 U.S. at 283) and

In any event, the warrant in this case was sufficiently particularized as to the objects of the search. It only permitted the INS to locate, question and remove illegal aliens (Pet. App. 30a-31a). And it significantly restricted the scope of the search, permitting INS agents to enter only those portions of Blackie's House of Beef where aliens could be found,[10] and allowing questioning only when agents had an articulable suspicion that the person was an alien (*ibid.*; 8 U.S.C. 1357(a)(1)).[11] In these circumstances, the court of appeals correctly concluded that the search of Blackie's premises was reasonable.

3. There is no need to remand this case to the district court for consideration of the sufficiency of the warrant under the guidelines of the court of appeals (see Pet. 18-19). The court of appeals found that the warrant and its supporting affidavits complied with controlling principles of law

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administrative search warrants for vehicles or buildings within the interior of the United States frequently have been approved by this Court. *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979); *Marshall* v. *Barlow's, Inc., supra.*

[10]It is immaterial that no illegal aliens were discovered hiding in Blackie Auger's office on the second floor (Pet. App. 73a). Search of that area was reasonable because the office was accessible to escaping illegal aliens. Furthermore, the affidavits provided to the magistrate stated that Auger himself hid illegal aliens in a storage room on the first floor "when Immigration comes" (Pet. App. 67a).

[11]The fact that an INS informant provided first names and other information about some of the illegal aliens merely supports the reasonableness of the search warrant. It does not, as petitioner suggests (Pet. 15), increase the level of probable cause required or trigger criminal warrant requirements (Pet. App. 27a n.15, 28a).

(Pet. App. 35a). Petitioner's belated and unsupported speculations as to the reliability of the affiants' information does not present a substantial basis for further proceedings.[12]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

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[12]Petitioner was free to explore the reliability of the informant's affidavit in the courts below. Having failed to do so, it should not now be heard to complain, based on pure speculation and a professed inconsistency (Pet. 18-19), that the affidavit of the informant was unreliable. Moreover, the alleged "inconsistency"—that some first names of illegal aliens supplied by the informant were not among the names of those seized—is hardly fatal to the informant's credibility. Since the search took place during only one of three employee shifts at Blackie's, yet still resulted in the seizure of 14 illegal aliens, the other "names" could well belong to workers on other shifts.

DOJ-1982-01

# Petitioner's Reply Brief

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No. 81-949

IN THE

# Supreme Court of the United States

OCTOBER TERM 1981

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BLACKIE'S HOUSE OF BEEF, INC.,
*Petitioner*

v.

LEONEL J. CASTILLO, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, et al.,
*Respondents*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER*

1. The decision of the Court of Appeals directly conflicts with the Supreme Court's majority opinion in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), which specifically rejected the administrative standard of probable cause for immigration searches. 413 U.S. at 270, *accord, United States v. Ortiz,* 422 U.S. 891, 892, 896-97. *See* Pet. 12-13. The Government (Opp. 4-5) has not cited any majority opinion of any federal court to the contrary. The Government's distinction (Opp. 7), that these cases involve warrantless searches, is immaterial, because whether with or without a warrant, probable cause is required nonetheless.

*Petition for certiorari contains Rule 28.1 list.

The Government misapplies the concurring opinion of Justice Powell in *Almeida-Sanchez, supra,* which suggested that it might be feasible "to obtain advance judicial approval to conduct roving searches on a particular road or roads" near border areas, applying a standard constitutionally akin to probable cause. 413 U.S. at 283. Justice Powell specifically distinguished such case from searches of persons or buildings which are far more intrusive and limited the application of his remarks to conducting roving vehicular searches in border areas:

> While these searches are not border searches in the conventional sense, they are incidental to the protection of the border and draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border. *Finally, and significantly, these are searches of automobiles rather than searches of persons or buildings. The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court "has long distinguished between an automobile and a home or office." Chambers v. Maroney,* 399 U.S. 42, 48, 26 L Ed. 2d 419, 90 S. Ct. 1975 (1970). (Emphasis added.)
>
> * * * * * *
>
> The conjunction of these factors – consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched – persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause *to conduct roving vehicular searches in border areas.* (Emphasis added).

413 U.S. at 279.

The Government's reliance (Opp. 5) on *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) and *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976) is seriously misplaced. Those cases developed the standards for stop and questioning of, *not searches* for, aliens. Moreover, those cases involved a patrol near the border and at a fixed checkpoint 66 miles from the border. Indeed, the Court emphasized in *Martinez-Fuerte, supra:*

> *We deal neither with searches nor with the sanctity of private dwellings,* ordinarily afforded the most stringent Fourth Amendment protection. *See, e.g. McDonald v. United States,* 335 U.S. 451 (1948). (Emphasis added.)

428 U.S. at 561.

Finally, since *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978) derives its administrative standard of probable cause from *Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967), two cases which this Court by name rejected as standards for immigration searches in *Almeida-Sanchez, supra,* reliance upon *Marshall v. Barlow's, Inc., supra,* by the Court of Appeals is dubious. The Government fails to address this crucial argument raised in the petition.

2. The Government contends that an agency which has dual civil and criminal enforcement authority and obtains information pursuant to an administrative search which may ripen into a criminal prosecution does not invalidate the use of an administrative warrant. Opp. 7 n.8. This ignores the thrust of petitioner's argument which is that when criminal violations are known or suspected *before* the search, as in the instant case, applying an administrative standard is wholly inappropriate. None of the

cases which the Government cites (Opp. 7 n. 8) would permit this type of conduct.

As for petitioner raising this point below, the argument was made at oral argument before the Court of Appeals, when that Court, for the first time, erroneously indicated that the Immigration Service was involved in only the civil enforcement of laws. Petitioner argued then, and in the petition for rehearing, that, on the contrary, the Immigration Service is responsible for both criminal and civil enforcement. Indeed, the companion to this case, *Blackie's House of Beef v. Castillo,* (Blackie's I), 467 F. Supp. 170 (D.D.C. 1978) involved a criminal search warrant for criminal violations under the Immigration and Nationality Act. Moreover, the argument is fairly contained in the issue that full probable cause is required, which petitioner briefed in the Court below. Appellee Brief 15-19.

3. The decision of the Court of Appeals, upholding the authority of the Immigration Service officers to obtain and execute a civil search warrant based upon 8 U.S.C. § 1357(a), conflicts with the mandatory language of 8 U.S.C. § 1357(a), which requires regulations to be issued for its enforcement. Regulations for the search and seizure by search warrant for illegal aliens do not exist. See 8 C.F.R. 287. Without the required regulatory authority, the officers unlawfully sought and executed the warrant. The Government, likewise, ignores this essential requirement.

Contrary to the Government's assertion, petitioner did argue in the Court below that there was no regulatory authority for the Immigration Service officers to seek or execute civil search warrants. Appellee Brief 12.

4. The decision of the Court of Appeals conflicts with the Fourth Amendment command that search warrants must "particularly describe * * * the person to be seized."

The Government argues (Opp. 6) that particularity in the criminal law sense is not required. That is not the issue. "Particularity of description" is required in any search warrant, civil or criminal. The Fourth Amendment applies in both cases and makes no distinction. Indeed, the Government fails to cite any administrative search case where particularity is not required. Nor is the Government's position persuasive that the warrant, by describing the objects of the search to be "illegal aliens", is thereby particularized. Petitioner urges that this description of persons is anything but particular.

5. Contrary to the Government's claim (Opp. 4-5), the District Court had no jurisdiction to issue the warrant under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act does not provide federal courts with an independent grant of jurisdiction. *United States v. New York Telephone Co.*, 434 U.S. 159, 188 n. 19 (1977) (Stevens, J., *dissenting), citing, M'Intire v. Wood,* 7 Cranch 504 (1813); *Rosenbloom v. Bauer,* 120 U.S. 450 (1887). In each of the cases upon which the Government relies (Opp. 5), *United States v. New York Telephone, supra,* and *In re Carlson,* 580 F. 2d 1365 (10th Cir. 1978), the All Writs Act supported the issuance of orders where proceedings were *already pending*, not as a basis for *initiating* proceedings as in the instant case. Indeed, the Government had no pending proceedings, either by way of deportation or criminal, against the petitioner or any of the aliens at the time the warrants were issued.

6. The Government misapplies (Opp. 5) *Marshall v. Barlow's, Inc., supra,* in contending that express statutory authority to obtain search warrants is unnecessary. The Government ignores the crucial distinction in *Marshall v. Barlow's, Inc., supra*, that there was clear statutory authority to enter and search commercial premises and

that specific regulations for obtaining search orders were promulgated to effectuate that authority. *Marshall v. Barlow's, Inc., supra,* cannot be equated with the instant case where there is no express statutory authority for the Immigration Service under 8 U.S.C. § 1357(a) to enter commercial premises to search, much less any regulations permitting it by warrant.

The Government further ignores petitioner's list of nine other areas (Pet. 9) involving adminstrative inspections where the agencies were cloaked with *specific* statutory authority (with specific provisions for judicial intervention) to enter and search commercial premises. The Government has failed to demonstrate that Congress intended to depart from this pattern when enacting 8 U.S.C. § 1357(a). Put simply, § 1357(a) means what it says and the Court of Appeals was incorrect in assuming Congress intended more.

7. This case involves the validity of an immigration civil search warrant, a case of first impression in the federal court system. At the appeal stage, the Court below has set up new standards to be applied. Moreover, the Court went beyond the material facts stipulated by the parties pursuant to summary judgment proceedings by using the affidavits to assess the validity of the warrant.

Foremost, the Court of Appeals is not a fact-finding body. *Hetzer v. INS,* 420 F.2d 357, 361 (8th Cir. 1970). In addition, parts of that Court's findings of fact were clearly erroneous, *e.g.,* that there were two day long surveillances of Blackie's by Government agents, when, in fact, there were only three periods of observation for a total of three hours; that the key Government informant had worked at Blackie's, when, in fact, he had not; and that the informant had firsthand knowledge of where illegal aliens were hidden, which he did not.

When a new legal standard announced on appeal is applied to facts, which heretofore were not the material facts as stipulated in summary judgment proceedings, a remand is appropriate so that the parties may fairly develop what are now the material facts in light of this new standard. Under these circumstances, this case should have been remanded by the Court of Appeals.

Respectfully submitted,

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